92-127

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

EQUIBANK AND EQUIMARK CORPORATION,

Petitioners,

v.

JAMES W. LASH, individually and on behalf of other Equibank employees and former employees similarly situated,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the courts below, extending *Fort Halifax Packing Co. v. Coyne*, unduly narrowed the sphere of preemption imposed by ERISA through the use of the following devices, as to each of which the lower courts are in conflict:

a) excluding preemption where "lump-sum" damage awards are sought;

b) limiting preemption to cases brought against plan fiduciaries; and

c) limiting preemption to so-called "core" ERISA concerns or day-to-day plan "administration".

PARTIES TO THE PROCEEDINGS

Petitioner Equimark Corporation is a Delaware corporation with its principal place of business in Pennsylvania. Equimark's subsidiaries are Equibank and Equimanagement Corporation. Petitioner Equibank is a commercial bank organized under the laws of Pennsylvania with its principal place of business in Pennsylvania. Equibank's subsidiaries are Liberty Business Credit Corporation, American Financial Corporation of Tampa and First Associates Financial Corp. Respondents, James W. Lash and other Equibank employees and former employees similarly situated, are individuals.

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PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

The Petitioners, Equibank ("Equibank") and Equimark Corporation ("Equimark"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Pennsylvania Supreme Court, entered in the above-entitled proceeding on April 16, 1992.

OPINIONS BELOW

The *per curiam* decision of the Pennsylvania Supreme Court is reported at 604 A.2d 1027 (Pa. 1992). (A1) The Pennsylvania Superior Court's opinion (B1) is not officially reported. The opinion of the Court of Common Pleas of Allegheny County, Pennsylvania (C1) is not officially reported.

JURISDICTION

The Pennsylvania Supreme Court entered its opinion and judgment in this case on April 16, 1992. (A1)

The jurisdiction of this Court to review the decision of the Pennsylvania Supreme Court is invoked under 28 U.S.C §1257(a).

STATUTE INVOLVED

Section 514(a) of the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"), provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. §1144(a).

STATEMENT OF THE CASE

On November 8, 1984, Equibank announced its intention to terminate the Equimark Corporation Retirement Plan, a defined pension benefit plan under Section 3(2) of ERISA, 29 U.S.C. §1002(2) (the "Pension Plan"). (D20)[1] Approximately eight million dollars in funds exceeding those needed to provide full benefits was expected to revert to Equibank upon the termination. *See* ERISA §4044(d), 29 U.S.C. §1344(d). (D20-21, 23-24, 33)[2]

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[1] The Court of Common Pleas of Allegheny County, Pennsylvania decided the preemption issues presented here on the basis of preliminary objections to the Complaint, the Pennsylvania equivalent of Fed. R. Civ. P. 12(b)(6). (C1) Accordingly, the statement of facts is based upon the Complaint and the inferences reasonably drawn therefrom. *Gillespie v. St. Joseph's Univ.*, 355 Pa. Super. 362, 364, 513 A.2d 471, 472 (1986).

[2] Under ERISA, an employer terminating a plan may use excess funds only after it has ensured the payment of earned benefits through the purchase of annuity contracts and otherwise complied with the act. *See* 29 U.S.C. §1344(d); *see also* E.T. Veal & E.R. Mackiewicz, *Pension Plan Termination*, (Wiley, 1989).

(Continued on following page)

Equibank also announced plans to enhance the then existing Employee Savings and Retirement Plan by providing an annual employer contribution and to create an Employee Stock Ownership Plan (the "ESOP"). (D20-21)[3]

Equibank proposed to apply the Pension Plan's eight million dollar reversion to its capital and to establish the ESOP with approximately three million shares of Equimark stock, then worth roughly eight million dollars. In various communications to its employees, Equibank identified how it planned to fund the ESOP, the employees eligible to participate in the ESOP, the manner in which it would distribute ESOP assets to eligible employees and when such assets would become payable, *i.e.*, upon each employee's retirement or termination. (D22-27, 37-38) Equibank further informed its employees that establishment of the ESOP was contingent on the appropriate shareholder and regulatory approvals. (D30-31) The

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A number of courts of appeal have adjudicated disputes under ERISA about the rights of parties to such reversionary funds. *See, e.g., Wilson v. Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987); *Bryant v. International Fruit Prods. Co.*, 793 F.2d 118 (6th Cir.), *cert. denied*, 479 U.S. 986 (1986); *Delgrosse v. Spang and Co.*, 769 F.2d 928 (3d Cir. 1985), *cert. denied* 476 U.S. 1140 (1986); *Bouchard v. Crystal Coin Shop, Inc.*, 843 F.2d 10 (1st Cir. 1988).

[3] An ESOP is an employee retirement plan that acquires stock of the sponsoring employer and holds it in trust for employees participating in the ESOP. An ESOP is a "qualified" retirement plan, designed to satisfy the discrimination, participation, vesting, distribution and other requirements of the Internal Revenue Code of 1986, as amended, and ERISA. 26 U.S.C. §§409, 4975.

Complaint alleged that Equibank did not issue the Equimark stock to the ESOP as proposed. (D10)[4]

Thereafter, Plaintiff James W. Lash ("Lash"), individually and on behalf of other Equibank employees and former employees, brought this action, the gravamen of which is this: Equibank was legally bound by its proposal to create an ESOP, thus the class should receive a direct distribution of their respective allotment of the three million shares of Equimark stock. (D1) Specifically, Lash asserted state law causes of action for breach of contract, breach of an implied duty of good faith and fair dealing, unjust enrichment and constructive trust for Equibank's failure to provide "the agreed compensation in the form of the 3,000,000 Equimark shares of stock." (D10, 14-19)[5] The Complaint does not specify how each individual's portion is to be calculated, but presumably it would

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[4] Equibank announced termination of the Pension Plan as of November 30, 1984. (D20) However, final reversion of excess Pension Plan assets to Equibank could not occur until June, 1990 in view of the 1984 enactment of the Retirement Equity Act of 1984 ("REA"), Pub. Law 98-397, 98 Stat. 1426 (1984), which required terminating defined benefit plans to provide certain early retirement benefits. Only after Congress passed special legislation consisting of an amendment in late-1989 providing that REA did not apply to the termination of the Pension Plan could distribution of all Pension Plan assets incident to Plan termination become final. *See* Pub. Law 98-397, 98 Stat. 1426 (1984), as amended by Pub. Law 99-514 §1145(f)(1), 100 Stat. 2491 (1986), and 101-239 §7861(d)(1), 103 Stat. 2431 (1989). Lash commenced this action on November 7, 1988, long before the final action of Congress affecting the Pension Plan.

[5] The Complaint studiously avoids any explicit mention of ERISA notwithstanding the fact that its averments reflect that the claims of the class are entangled with no fewer than three Equibank employee benefit plans.

require reference to service and vesting requirements of the proposed ESOP.

The Complaint on its face refers to alleged wrongs involving three benefit plans (the Pension Plan, the Savings and Retirement Plan and the proposed ESOP).[6] Equibank and Equimark filed preliminary objections to the Complaint, contending, *inter alia*, that ERISA preempted Plaintiffs' claims. (E1) The trial court dismissed the Complaint on grounds that it lacked subject matter jurisdiction, finding that a decision as to whether an ESOP was created was central to the dispute and that determination of this issue was for a federal court applying federal law. (C11)

The Superior Court of Pennsylvania reversed, holding that ERISA does not preempt Plaintiffs' state law claims. The court first erroneously concluded that "[b]oth parties agree that there was no plan in existence." *Lash* (B7).[7] It then stated that "[a]ll of Lash's claims surround the allegation that there was . . . *a contract to form a plan*,"

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[6] It is not suggested in the Complaint that the Employee Savings and Retirement Plan was not enhanced as Equibank announced.

[7] The record does not indicate that there was such an agreement and such a statement is contrary to assertions in the trial court, where Lash contended Equibank "failed to pay a benefit provided for in an established in-place employee benefit plan." (C9-10) Moreover, Petitioners have consistently asserted that if Lash prevails, the result would be the *de facto* establishment and funding of the proposed ESOP. Finally, the parties could not avoid ERISA's reach by agreement. *See Seamon v. Vaughan*, 921 F.2d 1217, 1219 (11th Cir. 1991) ("The parties may not contradict federal law by private agreement.").

(B10) (emphasis added), and held that such claims do not "relate to" an employee benefit plan within the meaning of Section 514(a) of ERISA.

Three separate rulings formed the basis of the Superior Court's "relate to" holding:

> (1) A claim for a one-time lump-sum damage payment, even though measured by the terms of the proposed ESOP, did not relate to an employee benefit plan (B12);
>
> (2) The claims "are not made against Equimark or Equibank as fiduciaries of any proposed plan, but rather are made against them as past employers" (B11); and
>
> (3) The claims did not implicate certain *core* concerns of ERISA, *i.e.*, "the operation, establishment, or administration of an employee benefit plan." (B11)

Those three rulings were affirmed *per curiam* by the Supreme Court of Pennsylvania without opinion (A1), making it binding precedent on the issue. *See Commonwealth v. Gretz*, 520 Pa. 324, 325, 554 A.2d 19, 20 (1989) (Affirmance of unpublished memorandum decision constitutes "a binding decision of precedential authority on the question presented to and accepted for review."). The three "relate to" rulings bring Petitioners to this Court as substantial and direct conflicts exist among the courts with respect to each of them.[8]

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[8] Although the Supreme Court of Pennsylvania remanded the case for further proceedings, its decision is final for purposes of this Court's review under the fourth category of

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REASONS FOR GRANTING THE WRIT

1. Several Substantial and Direct Conflicts Among the Courts Exist and Will Be Resolved By a Decision in This Case.

ERISA's preemption provision, Section 514(a), is prominent among the safeguards Congress designed to preclude abuse and secure the rights brought into being by this legislation. *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 482 (1990). "The preemption clause is conspicuous for its breadth." *FMC Corp. v. Holliday*, 111 S.Ct. 403, 407 (1990).[9] Its "deliberately expansive" language was

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exceptions to the final judgment rule in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). The federal issue has been finally decided. Moreover, this Court's reversal of the decision below will be preclusive of any further litigation on the state causes of action and will prevent a serious erosion of the federal policy underlying ERISA. Preemption cases are paradigmatic examples of the fourth *Cox Broadcasting* category. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988) (whether Supremacy Clause invalidates Ohio statute); *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984) (whether Federal Arbitration Act preempts California statute); *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983) (whether state causes of action are preempted by National Labor Relations Act); *Construction and Gen. Laborers Local 438 v. Curry*, 371 U.S. 542, 550 (1963) (whether National Labor Relations Act preempts state proceedings).

[9] The key to Section 514(a) is found in the words "relate to." *Ingersoll-Rand*, 111 S.Ct. at 482. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983). A state law may "relate to" a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987).

"designed to establish pension plan regulation as exclusively a federal concern." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987).[10]

Notwithstanding the breadth of Section 514, this Court held in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), that ERISA did not preempt a state severance pay statute because it did not require the establishment or maintenance of an ongoing plan.[11] As the dissent predicted, however, *Fort Halifax* "create[d] a loophole in ERISA's preemption statute," allowing lower federal and state courts to "undermine Congress' decision to make employee-benefit plans a matter of exclusive federal regulation." *Fort Halifax*, 482 U.S. at 23 (White, J., dissenting).

The three rulings of the Pennsylvania courts below are typical of lower court attempts to exploit the

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[10] Some state actions and laws, however, may affect employee benefit plans in "too tenuous, remote or peripheral a manner to warrant a finding that the law 'related to' a plan." *Shaw*, 463 U.S. at 100 n.21.

[11] In *Fort Halifax*, the Court considered a Maine statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing. The Court held that the "one-time, lump-sum" payment implicated by the statute did not "relate to" a plan because it "require[d] no administrative scheme whatsoever." *Fort Halifax*, 482 U.S. at 12. The dissent (Rehnquist, C.J., White, O'Connor and Scalia, JJ.) warned that "[b]y making pre-emption turn on the existence of an 'administrative scheme' ", the Court "creates a loophole" in Section 514(a) destined to undermine Congress' decision to make the governance of employee benefit plans a matter of exclusive federal regulation. *Id.* at 23.

language of *Fort Halifax*. Some courts, including those below, have expanded *Fort Halifax* and related loopholes to limit preemption. Other courts, however, have refused to limit preemption by expansion of *Fort Halifax*, resulting in substantial and direct conflicts among the courts of appeals and highest state courts that will be resolved by a decision in this case.

First, the courts are divided as to whether claims for one-time, lump-sum damage payments, including those measured by reference to a benefit plan, are preempted by ERISA.[12] Courts that encroach on the broad

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[12] *Compare Hospice of Metro Denver, Inc. v. Group Health Ins. of Oklahoma, Inc.*, 944 F.2d 752, 755 (10th Cir. 1991) (claim for damages based upon plan benefits not preempted because payment of one-time, lump-sum amount not an administrative burden); *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 247 (5th Cir. 1990) (claim against plan administrator for one-time recovery not preempted even though measured by reference to benefit plan); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120-21 (4th Cir. 1989) (claim against employer for damages consisting in part of lost pension benefits not preempted); *Martori Bros. Distribs. v. James-Massengale*, 781 F.2d 1349, 1358-59, *as amended*, 791 F.2d 799 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986) (claim against employer requiring calculation of damages by reference to fringe benefits not preempted); *Klank v. Sears, Roebuck and Co.*, 735 F. Supp. 260, 263-64 (N.D. Ill. 1990) (claim against employer for damages consisting in part of lost pension benefits not preempted); *Teper v. Park West Galleries, Inc.*, 431 Mich. 202, 427 N.W. 2d 535, 540-41 (1988) (damage award calculated on terms of plan not preempted) *with Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1218 (5th Cir. 1992) *petition for cert. filed* (U.S. May 26, 1992) (No. 91-1881) (noting conflict and stating that measurement of damages by reference to pension plan weighs in favor of preemption); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1294 (5th Cir. 1989) (contract claim

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preemptive scope of ERISA by reference to the one-time, lump-sum nature of the damages sought invariably rely on *Fort Halifax*.[13] A decision reversing the Pennsylvania Supreme Court in the instant case will prevent plaintiffs and lower courts from expanding upon the one-time, lump-sum payment language of *Fort Halifax* to narrow the broad preemption intended by Congress.

Second, the courts are in conflict as to whether state law claims avoid preemption merely because a plan fiduciary is not a defendant.[14] Encroachment in this

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preempted where damages sought were created and measured by plan); *Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 680 (10th Cir. 1990) (affirming district court decision that claims for lost salary are not preempted by ERISA, and noting that district court had held claims for lost pension benefits are preempted).

[13] *See, e.g., Memorial Hosp.*, 904 F.2d at 247; *Pizlo*, 884 F.2d at 120-21 (citing cases); *Klank*, 735 F. Supp. at 264 (citing cases); *Teper*, 427 N.W. 2d at 539-40.

[14] *Compare Quigley v. Unum Life Ins. Co.*, 887 F.2d 258 (1st Cir. 1989), *aff'g*, 688 F. Supp. 80, 83 (D. Mass 1988) (defendant "not a fiduciary subject to the constraints of ERISA and thus, the plaintiffs' claims are not preempted for this reason"); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1505 (9th Cir. 1985) (allowing plaintiffs to bring state law claims because they alleged violation of duties as former employer, not violation of duties created by plan); *Greenblatt v. Budd Co.*, 666 F. Supp. 735, 742 (E.D. Pa. 1987) (conclusion that plaintiff's claim does not relate to plan supported "by the fact that the representations at issue were made by plaintiff's supervisors, as his employers, and not as plan fiduciaries"); *Munoz v. Prudential Ins. Co. of America*, 633 F.Supp. 564 (D. Colo. 1986) (ERISA does not preempt claims against non-fiduciary plan administrators); *Shofer v. Stuart Hack Co.*, 324 Md. 92, 595 A.2d 1078, 1086 (1991), *cert.*

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instance is achieved not only through a straightforward "plan fiduciary" test (*supra* footnote 14), but through an analysis of whether state laws or claims impact on the "primary ERISA entities", *i.e.*, the employer, the plan, the plan fiduciaries and the beneficiaries. *See, e.g., Arkansas Blue Cross and Blue Shield v. St. Mary's Hosp. Inc.*, 947 F.2d 1341, 1344 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 2305 (1992) (citing cases); *Memorial Hospital*, 904 F.2d at 245; *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 556 (6th Cir. 1987).

Third, the courts are divided as to whether *Fort Halifax* limits preemption to those cases in which the underlying conduct complained of arises from day-to-day administration of a plan.[15] In these cases, courts have begun excluding preemption notwithstanding the fact

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denied, 112 S. Ct. 1174 (1992) (claim against nonfiduciary not preempted); *Bricker v. Maytag Co.*, 450 N.W. 2d 839, 842 (Iowa 1990) (claim against employer not preempted) *with Consolidated Beef Indus., Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 964 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992) (whether defendant is ERISA fiduciary is irrelevant to preemption analysis); *Gibson v. Prudential Life Ins. Co.*, 915 F.2d 414 (9th Cir. 1990) (same); *Cefalu*, 871 F.2d at 1292, 1295 (holding that ERISA preempts state law claim regardless whether it is asserted against plan or employer).

[15] The Pennsylvania courts held that Lash's claims were not preempted because they did not involve "the operation, establishment, or administration of an employee benefit plan." *Lash* (B11).

that the state claim in question will have an *effect* on a plan by requiring the payment of additional benefits.[16]

Moreover, by holding Lash's claims not preempted because they purportedly did not relate to the administration of a plan, Pennsylvania joined the ranks of courts following *Fort Halifax* to narrow preemption to so-called "core" ERISA concerns.[17] This encroachment of ERISA

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[16] *Compare Pizlo*, 884 F.2d at 120-21 (state law breach of contract claim concerning non-administrative employer conduct not preempted, relying on *Fort Halifax*); *Martori Bros.*, 781 F.2d at 1358-59 (state law claim concerning non-administrative employer conduct not preempted, cited with approval in *Fort Halifax*); *Klank*, 735 F. Supp. at 264 (state law fraud and misrepresentation claims concerning non-administrative employer conduct not preempted, relying on *Fort Halifax*); *Bricker*, 450 N.W.2d at 841-42 (state law equitable estoppel claim concerning non-administrative employer conduct not preempted, relying on *Fort Halifax*) *with Consolidated Beef*, 949 F.2d at 964 (state law misrepresentation claim concerning non-administrative employer conduct preempted); *Lee v. E. I. DuPont de Nemours and Co.*, 894 F.2d 755, 758 (5th Cir. 1990) (state law fraud and misrepresentation claims concerning non-administrative employer conduct preempted); *Lister v. Stark*, 890 F.2d 941, 945 (7th Cir. 1989), *cert. denied*, 111 S.Ct. 579 (1990) (state law breach of contract claim concerning non-administrative employer conduct preempted); *Jackson v. Martin Marietta Corp.*, 805 F.2d 1498, 1500 (11th Cir. 1986) (claim for breach of contract concerning non-administrative employer conduct preempted).

[17] *See, e.g., Memorial Hosp.*, 904 F.2d at 245 (first part of two-part preemption test is whether "state law claims address areas of exclusive federal concern"); *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146-47 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989) (what triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefit plans); *Martori*

(Continued on following page)

preemption directly conflicts with this Court's explicit recognition in *Shaw* that ERISA cannot "be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA – reporting, disclosure, fiduciary responsibility, and the like." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983).

The concern that ERISA preemption will leave plaintiffs without a remedy tempts some courts, including those below, to encroach upon the broad scope of ERISA preemption using one of the *Fort Halifax* loopholes, notwithstanding this Court's clear direction to give Section 514 the full scope intended by Congress.[18] Accordingly, this Court should make clear that the possible absence of a statutory remedy is not grounds to deny preemption, but is an issue to be determined in a properly framed case under ERISA.

(Continued from previous page)

Bros., 781 F.2d at 1357-58 (state law is preempted "if conduct sought to be regulated . . . is 'part of administration of an employee benefit plan.' "). *But see Olson v. General Dynamics Corp.*, 950 F.2d 1418, 1421 (9th Cir. 1991), *cert. denied*, (U.S. June 15, 1992) (91-1698) (state claim may be preempted even if it does not concern the technical aspects of plan administration).

[18] *See Memorial Hosp.*, 904 F.2d at 248 n. 16 (noting conflict); *HealthAmerica v. Menton*, 551 So.2d 235, 244 (Ala. 1989), *cert. denied*, 493 U.S. 1093 (1990) (same). *Compare Hospice of Metro Denver*, 944 F.2d at 755 (lack of alternative remedies in the event of preemption should be considered as part of preemption analysis); *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1990) (no preemption of state law claims if ERISA provides no remedy), *with Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 11 (2d Cir. 1992) ("preclusion of remedy does not bar the operation of ERISA preemption"); *Lee*, 894 F.2d at 757 (absence of ERISA remedy is irrelevant to preemption issue); *Lister*, 890 F.2d at 946 (same).

The courts of appeals and state courts have spent significant time and resources considering the "relate to" standard of Section 514(a) of ERISA, yet confusion and conflict is prevalent. Because the court below justified its encroachment on ERISA through the use of devices that are subject to wide-spread conflicts, this case presents an excellent opportunity to protect the scope of ERISA pre-emption on multiple grounds.

2. The Pennsylvania Supreme Court Erroneously Construed an Important Federal Statute and Disregarded this Court's Mandate For Broad Preemption As Intended By Congress.

Lash's Complaint alleged: (1) identifiable intended benefits, $8.1 million worth of stock to be placed in the ESOP; (2) a class of beneficiaries, "Eligible Employees" as defined in the Complaint (D10-11); (3) a financing source, the $8.1 million dollar surplus from the Pension Plan; and (4) procedures for receiving benefits, a proposed vesting schedule and payment schedule included as exhibits to the Complaint. (D37-38) Accordingly, Lash alleged the establishment and/or existence of an ERISA benefit plan, from which Plaintiffs seek benefits. *See Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc).[19]

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[19] *See also Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991); *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449, 1452 (5th Cir. 1991); *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 738 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985) (all applying *Donovan*); *Hollingshead v. Burford Equip. Co.*, 747 F. Supp. 1421, 1427 n.1 (M.D. Ala. 1990) (applying *Donovan* analysis to employee pension benefit plans).

Nevertheless, the Pennsylvania court embraced Plaintiffs' mischaracterization of their claim as one for breach of a "contract to form a plan," and held it not preempted by ERISA.[20] This result is fundamentally flawed because it sharply restricts the scope of preemption intended by Congress. Each of the three devices employed by the court below improperly allows encroachment upon the conspicuously broad scope of ERISA preemption.[21]

First, the court below evaded ERISA preemption by simply allowing Lash to characterize his damages as entitlement to a one-time, lump-sum payment. *Lash* (B12). This device is an unwarranted extension of *Fort Halifax's* holding that Maine's severance pay statute was not preempted because it created "the theoretical possibility of a one-time obligation in the future." *Fort Halifax*, 482 U.S. at 12. Moreover, the distinction elevates form over substance, since "it is no answer to a pre-emption argument

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[20] The Pennsylvania court also ignored the fact that ERISA governed the termination of the Pension Plan. The eight million dollars which are at issue could not revert to Equibank in full until 1990, after the adoption by Congress of legislation making certain provisions of the REA inapplicable to the Pension Plan. *See* Pub. Law 98-397, 98 Stat. 1426 (1984), as amended by Pub. Law 99-514 §1145(f)(1), 100 Stat. 2491 (1986), and 101-239 §7861(d)(i), 103 Stat. 2431 (1989).

[21] In the context of the Airline Deregulation Act, this Court recently reaffirmed that the ordinary meaning of the "relate to" language of section 514 of ERISA "is a broad one – 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with; a connection with.' " *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031, 2037 (1992) (quoting, Black's Law Dictionary 1158 (5th ed. 1979)).

that a particular plaintiff is not seeking recovery of pension benefits." *Ingersoll-Rand*, 111 S. Ct. at 486. *See also Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146 (2d Cir. 1984) (Among laws that are preempted are "those that provide an alternative cause of action to employees to collect benefits protected by ERISA.").[22] Regardless of the label attached to the claim, Lash seeks employee benefits and therefore his state law claims are preempted.

Second, the Pennsylvania court held that ERISA preemption does not apply to a suit against a non-fiduciary. (B11) Whether a certain state action is preempted is a question of congressional intent, to be determined by "the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand*, 111 S.Ct. at 482. There is no basis in ERISA to limit preemption of claims that "relate to" benefit plans simply because such actions may have been brought against non-fiduciaries. *See Gibson v. Prudential Ins. Co. of America*, 915 F.2d 414, 418 (9th Cir. 1990). Indeed, ERISA provides a remedy in Section 502(a)(3) for misconduct by non-fiduciaries as well as fiduciaries, suggesting that Congress structured ERISA to regulate non-fiduciary behavior. *Gibson*, 915 F.2d at 417. Furthermore, the purpose of Section 514 of ERISA was

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[22] Lash's damage claims refer to an employee benefit plan in at least two ways. First, the amount of the proposed class' aggregate claims, $8.1 million, is measured by the reversionary sum remaining after termination of the Pension Plan in accordance with ERISA's requirements. Second, the amount (and even existence) of each putative class member's potential recovery will be measured by reference to the vesting, stock allocation and other terms of the proposed ESOP which are governed by ERISA.

"to 'establish pension plan regulation as exclusively a federal concern,' " *Pilot Life*, 481 U.S. at 45-46 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)), and thus, it is inconsistent with this purpose to limit preemption to claims against plan fiduciaries. Contrary to the Pennsylvania Supreme Court's decision, therefore, ERISA preempts claims that relate to an employee benefit plan even if the defendant is a non-fiduciary. *Gibson*, 915 F.2d at 418. *See also Consolidated Beef Indus., Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 964 (8th Cir. 1991); *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564 (11th Cir. 1987).

Third, the lower court also erred by limiting ERISA preemption to claims which "concern the operation, establishment or administration of an employee benefit plan." *Lash* (B11) Despite the suggestion of some federal courts of appeals to the contrary, preemption is not limited to the subject matter of ERISA, such as "reporting, disclosure, fiduciary responsibility and the like." *Shaw*, 463 U.S. at 98. In reaching this conclusion, the Court in *Shaw* relied upon Congress' decision to adopt a broad preemption provision instead of a narrow one limited to certain ERISA-related matters. *Id.* A similar attempt to limit the scope of preemption to "core" ERISA concerns was also rejected in *FMC. FMC Corp.*, 111 S.Ct. at 410-11 (rejecting attempt to narrow the preemptive effect of the "deemer" clause to "core ERISA concerns").

The instant case vividly illustrates the outcome-oriented analysis of the preemption issue made possible by the loopholes created in *Fort Halifax*. Each of the three devices employed below impermissibly encroaches upon the broad scope of preemption intended by Congress, and

does so in a manner which is contrary to this Court's other decisions construing Section 514. By reversing the Pennsylvania Supreme Court, the limited scope of *Fort Halifax* will be clarified and further erosion of the preemptive sweep of Section 514 will be prevented.[23]

3. This Case Presents Important and Recurring Questions of Law.

This Court should exercise its jurisdiction to correct the Pennsylvania Supreme Court's erroneous decision in *Lash* because it and other similar federal and state appellate decisions encroach upon the sphere of ERISA preemption, resulting in significant adverse effects for benefit plans.

First, the various factors applied by the courts of appeals and the Pennsylvania Supreme Court improperly restrict the scope of Section 514(a), ERISA's broad preemption clause, reviving Senator Javits' concern about "endless litigation over the validity of State action that

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[23] The Pennsylvania Supreme Court is generally hostile to preemption. This is not the first case in which it has ignored or explained away contrary precedent from this Court. *E.g., compare Norfolk & W. Ry. v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 413 A.2d 1037 (1980) *with Napier v. Atlantic Coastline R.R.*, 272 U.S. 605 (1926) *and compare Cummings v. National Ry. Passenger Corp.*, 514 Pa. 230, 523 A.2d 338, *cert. denied*, 484 U.S. 852 (1987) *with Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972); *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Corp.*, 394 U.S. 369 (1969); and *Union Pacific R.R. v. Price*, 360 U.S. 601 (1959).

might impinge on Federal regulation."[24] The reluctance of lower courts to enforce the proper scope of the "relate to" standard invites precisely the type of endless litigation that ERISA's drafters sought to preclude.

Second, central to Congress' efforts in drafting the broad preemption provision was the goal of achieving federally uniform regulation of employee benefit plans.[25] Congress believed that by preempting the field, it had achieved its goals of encouraging employers to establish benefit plans and of protecting benefit plan participants and beneficiaries from encroachments on their plans by eliminating the threat of conflicting and inconsistent state

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[24] Senator Javits, one of the architects of ERISA, explained that Congress viewed earlier versions of House and Senate bills defining the perimeters of preemption in relation to the areas regulated by ERISA as problematic since "[s]uch a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme." 120 Cong. Rec. 29942 (1974). To prevent this from occurring, Congress deliberately made the preemption provisions expansive in scope. *Pilot Life*, 481 U.S. at 46.

[25] *See* 120 Cong. Rec. 29942 (1974) (statement of Senator Javits) ("[T]he emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required – but for certain exceptions – the displacement of State action in the field of private employee benefit programs") and 120 Cong. Rec. 29933 (1974) (statement of Sen. Harrison Williams, Jr.) (preemption of the field intended to apply in its broadest sense with only the exceptions specified in the act).

and local regulation.[26] The state and federal courts, using *Fort Halifax* as a rationale for narrowing ERISA preemption, undercut Congress' goals and require courts to engage in a case-by-case, outcome-oriented analysis that results in the application of conflicting and inconsistent state laws to employee benefit plans.

Third, despite the "considerable guidance" provided by this Court as to the scope of ERISA preemption, "the issue of whether a particular state law, applied in a particular factual situation 'relates to' an ERISA plan continues to plague the lower courts." *Memorial Hosp. Sys. v. Northbrook Ins. Co.*, 904 F.2d 236, 244 (5th Cir. 1990). *See also HealthAmerica v. Menton*, 551 So. 2d 235, 241 (1989), *cert. denied*, 493 U.S. 1093 (1990) (White and O'Connor, JJ., dissenting) ("Courts nationwide continue to struggle with ERISA preemption issues occasioned by the 'relate to' language of Section 514(a)."). The decision of the Pennsylvania Supreme Court reflects the continuing confusion over the appropriate analysis on the "relate to" issue and will, in fact, add to that confusion, resulting in a narrowing of the conspicuously broad preemption intended by Congress.

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[26] *See* Staff of Senate Comm. on Labor and Public Welfare, 94th Cong. 2d Sess., Legislative History of ERISA 4670 (Comm. Print 1976) (statement of U.S. Rep. John Dent) ("I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation.")

The numerous conflicting decisions by the federal and state courts considering the "relate to" issue illustrate the need for guidance on this critical issue. *See, e.g., Arkansas Blue Cross and Blue Shield v. St. Mary's Hosp., Inc.*, 947 F.2d 1341, 1344-45 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 2305 (1992) (collecting factors); *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 145-46 (2d Cir.); *cert. denied*, 493 U.S. 811 (1989) (summarizing the status of "relate to" jurisprudence). In light of the increasing number of ERISA cases being filed in the federal courts,[27] resolution of the scope of Section 514(a), the threshold issue of preemption, presents a question ripe for review by this Court.

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[27] ERISA cases constitute a substantial and increasing portion of the federal dockets. In the 12-month periods ending June 30, 1990 and 1991, the number of new ERISA actions rose 13.7%, from 8,441 to 9,595. Virtually all of those cases were private civil actions. ERISA cases accounted for 3.9% and 4.6% respectively, of all civil actions commenced during those two periods. 1991 Admin. Office of U.S. Courts Annual Report at 191. No statistics have been located concerning the number of cases filed in the state courts under the concurrent jurisdiction provision, nor is it known how many times courts, in cases like *Lash*, have improperly rejected ERISA preemption.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Supreme Court of Pennsylvania.

July 14, 1992

Respectfully submitted,

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APPENDIX A

[J-91 OF 1992]
IN THE SUPREME COURT OF PENNSYLVANIA
Western District

JAMES W. LASH, individually and on behalf of other Equibank employees and former employees similarly situated	:	No. 22 W. D.
	:	Appeal Dkt. 1991
	:	
	:	Appeal from Order of Superior Court entered September 18, 1989, at No. 128 Pittsburgh 1989, Reversing Order of Court of Common Pleas of Allegheny County, Civil Division, entered January 12, 1989, at No. GD 88-19416, and Remanding Case
v.	:	
EQUIBANK, a Pennsylvania Banking Institution, and EQUIMARK CORPORATION, a Delaware Corporation, Appellants	:	
	:	
	:	
	:	
	:	
	:	Argued: March 11, 1992

ORDER

PER CURIAM: FILED: APRIL 16, 1992

Order affirmed.

JUDGMENT ENTERED THIS 16TH DAY OF APRIL, 1992.
/s/ Irma T. Gardner
Irma T. Gardner, Deputy Prothonotary

APPENDIX B

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

James W. Lash etc., Appellants	:	
v	:	No. 128 Pittsburgh 1989
Equibank, etc.	:	

ORDER

AND NOW, this 18th day of September, 1989, it is ordered as follows:

_____ Order affirmed.

__X__ Ordered reversed. Case Remanded. Jurisdiction Relinquished.

_____ Judgment affirmed.

_____ Judgment of Sentence affirmed.

_____ Judgment of Sentence reversed.

_____ Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

_____ Order modified as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa.R.A.P.

_____ Costs to be taxed as provided in opinion filed herewith.

_____ Appeal quashed.

BY THE COURT

/s/ Eleanor R. Valecko

DEPUTY PROTHONOTARY

JAMES W. LASH, INDIVIDUALLY AND ON BEHALF OF OTHER EQUIBANK EMPLOYEES AND FORMER EMPLOYEES SIMILARLY SITUATED	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
EQUIBANK, A PENNSYLVANIA BANKING INSTITUTION, AND EQUIMARK CORPORATION, A DELAWARE CORPORATION	:	No. 00128 Pittsburgh 1989

Appeal from the Order Dated January 12, 1989 in the Court of Common Pleas of Allegheny County, Civil No. GD 88-19416.

BEFORE: CIRILLO, P.J., and JOHNSON and HESTER, JJ.

MEMORANDUM: FILED: September 18, 1989

This is an appeal from the order of the Court of Common Pleas of Allegheny County dismissing appellant James W. Lash's complaint following preliminary objections. We reverse.

Lash was an employee of Equibank, a wholly owned subsidiary of Equimark Corporation. While employed by Equibank, Lash was a participant in the Equimark Corporation Retirement Plan ["the Plan"]. The Plan was terminated at the end of November, 1984. Shortly before the Plan was to end, Equibank sent a letter to its employees concerning the Plan's termination, and announcing its intention to create an employee stock ownership plan (ESOP) with some 8.1 million dollars in surplus funds from the Plan. A second document, entitled, "Equibank Compensation Program Changes," was distributed to the

employees before the termination date and gave a general description of the proposed plan. Two other documents were sent out, entitled, "Commonly Asked Questions," and "Compensation Program Changes At A Glance," both of which dealt with the terms and operations of the proposed plan.

No employee benefit plan ever materialized, however. Equibank and Equimark Corporation failed to take any steps to obtain shareholder or regulatory approval, actions which were necessary to the implementation of any plan. Lash filed a four count class action complaint on behalf of himself and other persons similarly situated against both Equibank and Equimark in the court of common pleas, contending the following:

> COUNT I. STATING A CLAIM AGAINST EQUIBANK FOR BREACH OF CONTRACT
>
> 34. Defendant Equibank contracted with its Eligible Employees after Defendants withdrew $8.1 million from the Plan which had previously been maintained for the benefit of Equibank employees to set aside approximately 3,000,000 shares of Equimark stock, having a value of approximately $8.1 million dollars to be allocated to Eligible Employees who worked at year end in 1984 and thereafter in 1985 and 1986.
>
> 35. Defendant Equibank failed to pay Eligible Employees approximately 3,000,000 shares of Equimark common stock, nor did either Defendant make any effort alternately, a good faith attempt or any reasonable effort to obtain the necessary approval to provide Eligible Employees the ESOP plan.

* * *

COUNT II. STATING A CLAIM AGAINST DEFENDANT EQUIBANK FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING IMPLIED IN THE NOVEMBER 8, 1984 CONTRACT WITH THE CLASS MEMBERS

38. The November 8, 1984 contract to pay Eligible Employees approximately 3,000,000 shares of Equimark common stock contained an implied duty of good faith and fair dealing.

39. Defendant's failure to act in good faith or to take any steps (or alternatively) to obtain shareholder and regulatory approvals breached its duty of good faith and fair dealing.

* * *

COUNT III. STATING A CLAIM AGAINST BOTH DEFENDANTS FOR UNJUST ENRICHMENT

42. Defendants' use of some or all of the Equimark stock that was to be distributed to Plaintiffs results in the unjust enrichment of Defendants, including certain of Defendants' senior management that would not have been entitled to participate in the ESOP plan.

* * *

COUNT IV. STATING A CLAIM AGAINST BOTH DEFENDANTS FOR CONSTRUCTIVE TRUST

45. Defendants are in a fiduciary or other special relationship with respect to Eligible Employees like Plaintiff Lash with whom Equibank and Equimark, through its control of Equibank, made a commitment on November 8, 1984

> to set aside and pay 3,000,000 shares of Equimark common stock in exchange for continued employment. This fiduciary or special relationship existed as a result of Defendants' taking of funds from the Eligible Employees' Pension funds, and simultaneously promising to use said funds exclusively for the Eligible Employees' benefits in exchange for their continued employment on dates certain at year end 1984, 1985, and 1986.
>
> 46. Defendants, as fiduciaries, are responsible for paying Plaintiffs the 3,000,000 shares of Equibank stock in accordance with Equibank's November 8, 1984, commitment.
>
> 47. Defendants' failure to pay Plaintiffs approximately 3,000,000 shares of common stock is a breach of their fiduciary duties, which gives rise to the need for a constructive trust over the 3,000,000 shares of Equimark stock for the benefit of Plaintiffs.

Lash requested damages for those employees who failed to receive their pro rata share of the stock, along with retroactive dividends, pre-judgment interest, and the costs of the suit along with an accounting.

Equibank and Equimark filed preliminary objections, arguing, among other things, that the complaint should be stricken because the Employee Retirement Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*, had preempted state law claims. The trial court granted the preliminary objections, and struck the complaint on the basis that it did not have subject matter jurisdiction over the claims at issue. According to the trial court, "The question raised is not, as contended for by the plaintiff,

whether the defendants failed to pay a benefit provided for in the plan, but is whether Equibank had in place an ESOP employee benefit plan. . . . " The court determined that this question was one which could only be decided by the federal courts, and dismissed the complaint for lack of subject matter jurisdiction.

On appeal, Lash argues the following three issues:

> 1. Whether state courts have jurisdiction to determine the existence of an employee benefit plan for purposes of resolving whether there is preemption under ERISA?
>
> 2. Whether state common law claims based on promises by an employer to establish an employee benefit plan, which promise was never carried out, are pre-empted by ERISA?
>
> 3. Whether a state court is obligated, if it finds that state common law claims are preempted because they relate to any employee benefit plan with the meaning of ERISA, to determine whether benefits are due employees under the purported employee benefit plan, pursuant to the state court's concurrent jurisdiction under 29 U.S.C. § 1132(e)(1)?

We must first consider whether the trial court was correct in holding that it had no subject matter jurisdiction over the instant claim. In matters involving ERISA, concurrent jurisdiction is granted to state courts over civil actions brought by a participant in or a beneficiary of a plan to recover benefits due him or her under the terms of the plan, to enforce his or her rights under the plan, or to clarify his or her rights to future benefits under the plan. *See* 29 U.S.C. § 1132(a)(1)(B). Here, Lash argues that

state courts must have concurrent jurisdiction along with federal courts to determine the existence of employee benefit plans. Lash contends that to the extent the resolution of a claim for benefits under a plan necessarily entails the determination that there is a plan in existence, state courts must have the ability to determine that there is in fact a plan. We need not decide this point, however, for we find that there is no need to determine whether or not a plan existed in order to determine whether or not Lash's complaints have been pre-empted by ERISA. Therefore, we find that the trial court erred in determining that it had no subject matter jurisdiction in this case.

Lash did not bring this action for an enforcement, clarification, or recovery of benefits under an existing plan; section 1132 therefore does not apply here. In his brief, Lash agrees with the trial court's statement that the existence of a plan must be determined before resolving the question of whether or not the issues raised here are pre-empted by ERISA. This, however, was not the thrust of his complaint. He argued there, not that the documents handed out by Equibank were themselves an employee benefit plan, but rather that they constituted a contract to provide such a plan, and that Equibank in failing to create a plan, breached its contract with its employees. Both parties agree that there was no employee benefit plan in existence; therefore, there is no need for this or any other court to determine whether or not a plan existed. We find, therefore, that the trial court erred in dismissing the complaint for lack of subject matter jurisdiction. *See Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985) ("a mere allegation that an employer or employee organization ultimately decided to provide an

employee welfare benefit is not enough to invoke ERISA's coverage. . . . Such an allegation fails to allege the "establishment" of a plan"); *cf. Childers v. Northwest Airlines, Inc.*, 688 F.Supp. 1357 (D.Minn. 1988) ("Plaintiffs do not contend that Republic breached its contract with plaintiffs, or fraudulently induced them to agree to wage concessions because it failed to establish ESOPs or refused to give them the stock to which they were entitled under the terms of the ESOPs. Rather, the essence of their claim is that Republic breached its contract and fraudulently induced them to agree to wage concessions by failing to adopt plan requirements that would ensure equal participation in the ESOPs by all Republic employees. Such claims are "related to" a plan regulated by ERISA . . . ").

The question before us, then, is whether or not the claims presented by Lash are pre-empted by ERISA. ERISA was enacted to protect the interests of participants in employee benefit plans. *See* 29 U.S.C. § 1001. A broad pre-emption section was included in the statute to provide employers the advantages of a uniform set of administrative procedures for these plans governed by a single set of regulations unaffected by state and local rules. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, ___, 96 L.Ed. 2d 1, 11 (1987)[1] Section 1144 provides that "the provisions

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[1] It must be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.

(Continued on following page)

of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title, and not exempt under section 1003(b). . . . " 29 U.S.C. § 1144(a). The Supreme Court has held that the phrase, "relates to," is to be given broad construction; a law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan:

> Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature *requires an ongoing administrative program to meet the employer's obligation.*

Fort Halifax, 482 U.S. at ___, 96 L.Ed. 2d at 11 (emphasis added); *see also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-98 (1983). Common law causes of action as well as statutory law will be preempted under ERISA if they arise from the administration of such plans. Pre-emption of state law depends upon the conduct to which state law is applied. *See Scott*, 754 F.2d at 1504; *see also Jackson v. Martin Marietta Corp.*, 805 F.2d 1498, 1499 (11th Cir. 1986)

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Statement by Hon. Harrison A. Williams, Jr., Chairmam of the Senate Committee on Labor and Public Welfare, upon introducing the conference report on H.R. 2, August 22, 1974 in 3 *Congressional and Administrative News*, 93rd Cong. 2nd Sess., at 5188.

(change in pension service date directly affected administration of plan so that action was not too tenuous, remote or peripheral to warrant pre-emption under ERISA).

In this case, a reading of the complaint leads us to the conclusion that the claims are not pre-empted by ERISA. All of Lash's claims surround the allegation that there was a contract to set aside stock for eligible employees – in other words, that there was a contract to form a plan. Lash does not allege that the contract was the plan itself. This is somewhat similar to *Scott v. Gulf Oil Corp., supra.* In *Scott,* former employees of Gulf Oil Corporation brought suit against Gulf on state law contract and tort claims. The employees alleged that Gulf improperly negotiated with Thrifty Oil Corporation, their current employer, to hire them on terms of employment less favorable than they had enjoyed with Gulf. Further, they alleged that Gulf had promised to pay them severance pay, and had failed to do so. The district court found that all claims were pre-empted by ERISA; the Court of Appeals for the Ninth Circuit reversed in part, finding that those claims involving prospective benefits were not preempted:

> The claim for prospective benefits does not allege the denial of benefits under a benefit plan; rather it alleges that Gulf's tortious actions prevented the existence of such a plan in plaintiff's employment with Thrifty. It does not allege the violation of duties created by any welfare plan; rather, it alleges the violation of Gulf's duties as a past employer. The conduct giving rise to the claim was the negotiation of an employment contract which prevented the existence of an employee benefit plan. The claim

> does not raise any issues concerning the matters regulated by ERISA, namely, the administration, reporting, disclosure, funding, vesting, and enforcement of benefit plans.

Scott, 754 F.2d at 1505.

The same holds true for the case before us. Lash does not allege the violation of duties created by any employee benefit plan. The conduct which gives rise to his claims here is Equibank's broken promise to create a plan. It cannot be said that Lash's state law claims "relate to" any employee benefit plan in the Supreme Court's interpretation of that phrase. Disposition of the claims made here do not in any way concern the operation, establishment, or administration of an employee benefit plan. "Like promises for a raise in salary, a promotion, or the use of tickets to a baseball game, plaintiff's employer's promise to provide plaintiff with certain benefits at some unknown time in the future, upon which plaintiff could reasonably rely, is the essence of the [claim] alleged." *Greenblatt v. The Budd Co.*, 666 F.Supp. 735 (E.D.Pa. 1987) (action underlying complaint was that plaintiff had been deceived by verbal statements and actions of employer; fact that subject of statements was pension benefits was only incidental, and not essential to cause of action). Further, we note that the claims made here are not made against Equimark or Equibank as fiduciaries of any proposed plan, but rather are made against them as past employers. *See id.* at ___ (determination that count does not relate to plan supported by fact that misrepresentations were made by plaintiff's superiors as employers in ordinary course of business, not as plan fiduciaries in course of administering pension plan).

Equibank and Equimark argue that the causes of action outlined in Lash's complaint relate to an employee benefit plan because if recovery were won, the damages requested would force the creation of a plan. We disagree. The complaint does not require the payment of damages out of an ESOP, or that 3,000,000 shares of stock be delivered to plaintiffs in the class. The complaint merely requests that if defendants are found to be liable, the plaintiff class receives the benefit of its bargain, the equivalent of 3,000,000 shares of stock. The remedies of an accounting and a constructive trust are, in Lash's view, necessary tools to ensure that result. This does not require Equibank to set up or administer an ongoing employee stock ownership plan. *See Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349 (9th Cir. 1986), *amended*, 791 F.2d 799, ___ (9th Cir. 1986) ("It is difficult to see how the making of one-time lump sum payments could constitute the establishment of a plan. . . . [A] "make-whole remedy is an award of damages designed to put workers in the same economic position they would have been had their employer bargained in good faith"); *cf. Greenblatt, supra* (compensatory damages would be paid directly by the employer, not by pension fund).

Thus, we reverse the trial court's order granting appellees' preliminary objections and dismissing Lash's complaint. We conclude that Lash's claims are not pre-empted by ERISA, because they do not "relate to" an employee benefit plan. In addition, because we find that Lash's claims are not pre-empted by ERISA, we need not address Lash's final claim. We remand this matter for a determination of whether a contract to form a plan existed between the parties. Reversed and remanded. Jurisdiction is relinquished.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

JAMES W. LASH,
Individually
and on behalf of other
Equibank employees and
former employees
similarly situated,
Plaintiff,

V.

EQUIBANK, A Pennsylvania
Banking Institution, and
EQUIMARK CORPORATION,
a Delaware Corporation,
Defendants.

CIVIL DIVISION

CLASS ACTION
No. GD88-19416
Issue No.

Code

OPINION AND
ORDER
PRELIMINARY
OBJECTION OF
DEFENDANTS
SUSTAINED
AND COMPLAINT
OF PLAINTIFF
DISMISSED WITH
PREJUDICE

Filed by
HONORABLE
SILVESTRI
SILVESTRI
JUDGE

January 12, 1989

Copies to
Michael P.
Malakoff, Esq.
Edward C.
Schmidt, Esq.

OPINION

SILVESTRI, J.

The plaintiff, James W. Lash, filed this four-count civil action as a class action against Equibank and Equimark Corporation.

The defendants filed preliminary objections to all four counts in the nature of a motion to strike by reason of lack of subject matter jurisdiction. The defendants also filed a preliminary objection to each of the four counts in the nature of a demurrer.

When passing upon a preliminary objection which raises a question of subject matter jurisdiction or the sufficiency of the facts pleaded to state a cause of action, we accept all the well-pleaded material facts in the complaint as well as inferences reasonably deducible therefrom as true, but not any conclusions of law. *Zartman v. Lehigh County Humane Soc.*, 333 Pa. Super. 245, 482 A.2d 266 (1984); *Desantis v. Swigart*, 296 Pa. Super. 283, 442 A.2d 770 (1982).

With the foregoing standard applied to the complaint of Lash herein, the following facts are deemed to be established. Lash is a former Equibank employee having been employed with Equibank from October 1, 1956 through January 31, 1986. Equibank is a wholly owned subsidiary of Equimark. Lash was, during the course of his employment with Equibank, a participant in the Equimark Corporation Retirement Plan. The said Plan was in effect from 1968 until November 30, 1984 at which time the said retirement plan was terminated.

By letter, dated November 8, 1984 from Equibank to all eligible employees (Exhibit A to the complaint), Equibank notified its employees, as herein relevant, as follows:

(a) . . . we're planning to make several changes to your benefit program. These changes will give you part ownership in the bank's parent company.

(b) Effective November 30, 1984, the Equimark Corporation Retirement Plan will be terminated.

(c) approximately $8 million in surplus funds will become available and will be used to increase our primary capital by approximately $8 million.

(d) Equimark Corporation Common Stock (at $2.68 per share), with a value identical to the retirement plan surplus, will be set aside for employees through an Employee Stock Ownership Plan (ESOP).

(e) This plan is being created to provide all full-time and disabled employees *and* regular party-tiime [sic] (Code 20) employees with a windfall benefit equal to approximately 3 million shares of Equimark stock.

(f)* Your ESOP benefit will be paid to you in stock or cash at retirement or termination.[1]

---

[1] The letter stated that the benefits earned through November 30, 1984 under the present Retirement Plan will be guaranteed by way of an insurance annuity whether or not vested under the Plan.

Equibank, at a date not specified in the complaint, but after its November 8, 1984 letter and before November 30, 1984, distributed to its employees a document entitled "Equibank Compensation Program Changes" (Exhibit B to the complaint). This document consists of six (6) pages and several headings, and, as herein relevant, sets forth the following.

Under the heading "We're Ending the Present Retirement Plan . . . But You'll Keep What You've Earned and Get More . . . " it is stated:

(a) The present Equimark Corporation Retirement Plan is being terminated on November 30.

(b) We'll have a new plan in place on January 1, 1985 through an improvement to the Savings Plus Plan.

(c) . . . after November 30 . . . you'll begin earning retirement benefits in a new plan.

Under the heading "You Get A Stake In Equibank", it is stated:

(a) Surplus finds in the retirement plan (approximately $8 million) will be returned to Equibank as primary capital.

(b) The bank will then fund an Employee Stock Ownership Plan, or ESOP, with approximately 3 million shares of Equimark stock (at $2.68 per share) equal to the surplus in the retirement plan.

(c) . . . eligible Equibank employees will receive a windfall benefit through the ESOP.

(d) The ESOP is effective, retroactively, to January 1, 1984.

Under the heading "You're Eligible for ESOP if . . . ", it is stated:

(a) You're eligible for an ESOP contribution if you are a full-time active or disabled employee or a regular part-time (Code 20) employee.

(b) You do not have to enroll in the plan.

(c) You'll be included automatically if you are eligible.

Under the heading "Your ESOP Works Like This . . . ", it is set forth

(a) The ESOP contributions will be allocated to eligible employees over a three-year period: 1984, 1985 and 1986.

(b) At the end of each calendar year, the bank will make a contribution to the ESOP account of each eligible employee.

(c) The contribution will be in the form of Equimark stock issued for use only in the ESOP.

(d) The stock will be held in an account established in your name.

(e) Any dividends paid on the stock will be automatically invested in more stock.

(f) There is then set forth a formula to determine the amount of stock Equibank will contribute to each eligible employee each year.

Under the heading "You Can Get Your Money When You Retire", it is set forth,

(a) When you retire, you can take your ESOP account in the form of Equimark stock or cash.

Then there follows a continuing heading to the above " . . . Or Even Earlier", wherein it is stated:

(a) Under the ESOP, if you are vested, you receive your payout from the plan soon after you leave the bank.

(b) Upon your death, if vested, your account will be paid to your beneficiary.

(c) If you are presently totally disabled or become totally disabled and unable to work the bank will make contributions to your ESOP account based on your salary at the time of disability.

Under the heading "You're Fully Vested In The ESOP After Five Years", it is stated:

(a) Your past service as a member of the old retirement plan will count in determining when you become vested in the ESOP.

(b) If you've already earned 5 years of service under the retirement plan, you'll be fully vested in the ESOP.

(c) 40% vesting occurs after 2 years service, 60% after 3 years, 80% after 4 years and 100% after 5 years.

Under the heading "Enroll Later This Month," which appears following that part of the "Compensation Program Changes" entitled "Your Savings Plus Plan Is Now

the Employee Savings and Retirement Plan", it is provided

(a) You will also receive, later on, more detailed descriptions of all these plans that you can put in your Equibank Employee Handbook.

(b) Remember, this information provides highlights only.

(c) *Benefits* available under the plans *are governed by the official plan documents, which are available for your inspection in the Human Resources Department.* (emphasis ours)

(d) The ESOP will become effective only if shareholder and regulatory approvals are received early next year.

(e) *In the event any questions arise about the plans, the official plan documents will govern.* (emphasis ours).

The ESOP plan, as set forth in Exhibit B to the complaint, is one part of the document entitled "Equibank Compensation Program Changes". The document also detailed an Employee Savings and Retirement Plan.

In addition to the foregoing letter of November 8, 1984 and the "Compensation Program Changes", Equibank distributed to is employees two (2) other documents: one entitled "Commonly Asked Questions" and "Compensation Program Changes At A Glance", being Exhibits C and D, respectively, to the complaint. Both documents relate to the terms and operation of the ESOP plan and the Employee Savings and Retirement Plan, summarizing the terms and operation of each.

Neither Equibank nor Equimark attempted to obtain either shareholder or regulatory approval.

It is alleged that Equibank failed to provide to eligible employees their shares of Equimark stock as provided for in the ESOP plan as hereinabove set forth.

Lash in Count I against Equibank predicates his claim on the theory of a contract between Equibank and the eligible employees which Equibank breached and seeks damages sustained by reason of the eligible employees not having received their pro rata share of three million shares of Equimark stock.

In Count II Against Equibank the claim is based on the conclusory assertion that Equibank breached its duty of good faith and fair dealing by failing "to take any steps (or alternatively, reasonable steps) to obtain shareholder and regulatory approvals" and seeks damages sustained by reason of the eligible employees not having received their pro rata share of three million shares of Equimark stock.

In Count III against both Equibank and Equimark, the claim asserts a conclusion that "Defendants' use of some or all of the stock that was to be distributed to Plaintiffs results in unjust enrichment of Defendants, . . . " In this Count, the plaintiff seeks an accounting and damages sustained by reason of the eligible employees not having received their pro rata share of three million shares of Equimark stock.

Count IV against Equibank and Equimark is grounded on the claim that defendants made a commitment on November 8, 1984 to set aside and pay three

million shares of Equimark stock in exchange for continued employment. This created a fiduciary or special relationship and as fiduciaries defendants are responsible for paying plaintiffs three million shares of Equimark stock (erroneously referred to as Equibank in paragraph 46 of plaintiff's complaint) and the failure of the defendants to do so is a breach of their fiduciary duty, giving rise to a need for a constructive trust. Plaintiff seeks an accounting and damages sustained by reason of the eligible employees not having received their pro rata share of three million shares of Equimark stock.

Stripping the plaintiff's complaint of its convoluted verbiage, the claim of the plaintiff, individually and as representative plaintiff, is that there existed a valid binding contract between Equibank and the eligible employees, as defined, for Equibank to fund an ESOP plan as hereinabove set forth, which it and Equimark failed to do and that Equibank and Equimark are now liable to pay to each eligible employee their pro rata share of three million shares of Equimark stock.

In opposition to defendants' subject matter jurisdiction preliminary objection, the plaintiff claims it is only seeking a benefit under an established plan over which concurrent jurisdiction is given to the district courts of the United States and the State courts.[2]

The question raised is not, as contended for by the plaintiff, whether the defendants failed to pay a benefit provided for in an established in-place employee benefit

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[2] 29 U.S.C. 1132(e)(1)

plan, but is whether Equibank had in-place an ESOP employee benefit plan as hereinabove set forth.

The Employee Retirement Income Security Act (ERISA)[3] was enacted after Congress found[4], inter alia, that employee benefit pans had grown in size, scope and numbers and that the continued well-being and security of millions of employees and their dependants, are directly affected by these plans and that they are affected with a national public interest, and that it is desirable, in the interest of employees and their beneficiaries and to provide for the general welfare and the free flow of commerce, that disclosure by made and *safeguards be provided with respect to the establishment, operation and administration of such plans.* (emphasis ours)

Congress then declared the policy of ERISA was to, inter alia, protect the interest of participants in employee benefit plans and their beneficiaries and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

In *Donovan v. Dillingham,* 688 F.2d 1367 (1982) the Secretary of Labor, pursuant to his authority under ERISA, sued Trustees of an insurance trust on the basis they were fiduciaries subject to the fiduciary responsibility provisions contained in Part 4 of Title I of ERISA. The court stated, initially:

> Fiduciary duties under ERISA, however, arise only if there are employee benefit plans as defined by the Act.

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[3] 29 U.S.C. 1001, et seq.

[4] 29 U.S.C. 1001(a)

The Court then went on to determine whether or not there was in existence a plan and set forth criteria for making the determination which for our purposes are not herein relevant.

Here, as in *Dillingham*, in order to determine if Lash, and those similarly situated, are entitled to the claimed benefit, it must first be determined whether there was in existence an employee benefit plan establishing an ESOP. This is not to be determined by State breach of contract law, nor breaching an implied duty of good faith and fair dealing between parties to a contract, nor implying a contract under a theory of unjust enrichment or constructive trust.

The determination of the existence of an employee benefit plan has been given exclusively to the district courts of the United States.[5] Accordingly, we dismiss the complaint of the plaintiff for lack of subject matter jurisdiction.

ORDER

SILVESTRI, J.

AND NOW, this 12 day of January, 1989, after argument, consideration of the briefs of the parties and a review of the record, the preliminary objection of the defendants in the nature of a motion to strike for lack of subject matter jurisdiction is sustained and the complaint of the plaintiff is dismissed with prejudice.

BY THE COURT,
/s/ Silvestri, J.

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[5] 29 U.S.C. §1132(a) and (e)(1)

APPENDIX D

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

JAMES W. LASH, individually and on behalf of other Equibank employees and former employees similarly situated,

Plaintiffs,

v.

EQUIBANK, a Pennsylvania Banking Institution, and EQUIMARK CORPORATION, a Delaware Corporation,

Defendants.

(Filed Nov. 7, 1988
Prothonotary
Allegheny County)

NO. GD88 19416

CLASS ACTION COMPLAINT IN CIVIL ACTION

CODE NO.: 011

ISSUE NO.: Contract, Multiple Civil Action

JURY TRIAL DEMANDED

Filed on behalf of Plaintiff James W. Lash

Counsel of Record for this Party:

Michael P. Malakoff, Esquire
Pa. I.D. 11048

Fred S. Longer, Esquire
Pa. I.D. 46653

BERGER KAPETAN MALAKOFF & MEYERS, P.C.
508 Law and Finance Building
Pittsburgh, PA 15219
(412) 281-4200

Attorneys for the Representative Plaintiff James W. Lash and Class Plaintiffs

NOTICE TO DEFEND

YOU HAVE BEEN SUED in court. IF YOU WISH TO DEFEND against the claims set forth in the following pages, YOU MUST TAKE ACTION WITHIN TWENTY (20) DAYS after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that IF YOU FAIL to do so, the case may proceed without you and A JUDGMENT may be entered against you by the court without further notice for any money claimed in the complaint or for any claim or relief requested by the plaintiff. YOU MAY LOSE MONEY OR PROPERTY or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE OR KNOW A LAWYER, THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP:

LAWYER REFERRAL SERVICE

The Allegheny County Bar Association
920 City-County Building
Pittsburgh, Pennsylvania 15219
Telephone: 412-261-0518

CLASS ACTION COMPLAINT

AND NOW comes the representative Plaintiff, James W. Lash, individually, and on behalf of all other Equibank employees and former employees similarly situated (hereafter the "Eligible Employees"), by and through their Counsel, Berger Kapetan Malakoff & Meyers, P.C., and for their claims against Defendants Equibank and Equimark Corporation ["Equimark"] allege and state the following:

PRELIMINARY STATEMENT

1. This is a class action brought by the representative Plaintiff, James W. Lash, to recover damages against Defendants, Equibank and Equimark, for breaching and/or causing the breach of a contract made with Eligible Employees to pay them 3,000,000 shares of Equimark common stock through an Employee Stock Ownership Plan ("ESOP"). In addition, Equibank and Equimark are sued for unjust enrichment and as constructive trustees for a constructive trust.

PARTIES

2. Representative Plaintiff, James W. Lash, is a former Equibank employee who resides at 3496 Frye Avenue, Finleyville, Pennsylvania 15332. Plaintiff Lash was employed by Equibank (or its predecessor) from October 1, 1956 through his retirement on January 31, 1986. Plaintiff Lash is an "Eligible Employee" and was entitled to participate in the to be established ESOP.

3. Defendant Equimark Corporation is a Delaware Corporation. Equimark Corporation (Old Equimark) was incorporated in Pennsylvania in 1968 and was registered as a bank holding company under the Pennsylvania Bank Holding Company Act of 1956. On March 23, 1988, the Old Equimark was merged with and into Equimark (Delaware), Inc., accomplishing a reincorporation in Delaware. Subsequently, Equimark (Delaware), Inc. amended its charter to use the name Equimark Corporation. Equimark has its principal office at Two Oliver Plaza, Pittsburgh, Pennsylvania 15222. Defendant Equimark, at all relevant times, owned and controlled Defendant Equibank.

4. Defendant Equibank is a Pennsylvania banking institution. Equibank is a wholly owned subsidiary of Equimark. Equibank has its principal office at Two Oliver Plaza, Pittsburgh, Pennsylvania 15222.

STATEMENT OF THE CASE

5. Plaintiff Lash is a former Assistant Vice-President of Equibank and Manager of the Brentwood community office.

6. During the course of his employment with Equibank, Plaintiff Lash was a participant in the Equimark Corporation Retirement Plan [the "Plan"]. He had been a participant in the Plan from its inception in 1968 until November 30, 1984, at which time the Plan was terminated.

7. By letter dated November 8, 1984, Plaintiff Lash and other eligible Equibank employees were notified that

Defendants intended to terminate the Plan. This letter, in relevant part, stated:

> Dear Employee:
>
> As you know, we're planning to make several changes to your benefits program. These changes will give you part ownership in the bank's parent company. Here are the details:
>
> > Effective November 30, 1984, the Equimark Corporation Retirement Plan will be terminated. Approximately $8 million in surplus funds will become available and will be used to increase our primary capital by approximately $8 million.

A copy of Equibank's November 8, 1984 letter is attached hereto as Exhibit "A".

8. Defendant Equibank, on November 8, 1984, also contracted with its Eligible Employees, in exchange for their continued service, to return to all Eligible Employees the $8.1 million surplus from the terminated Plan by setting aside approximately 3 million shares of common stock (the value of the Plan surplus) to fund the ESOP. In its November letter (Exhibit "A"), Equibank stated:

> * Equimark Corporation Common Stock (at $2.68 per share), with a value identical to the retirement plan surplus, *will be set aside* for employees through an Employee Stock Ownership Plan (ESOP). This plan will give you a way to share in the bank's future success. As the stock increases in value, you'll reap the benefits. Your ESOP benefit *will be paid to you* in stock or cash at retirement or termination. (Emphasis added)

9. Defendant Equibank also provided its Eligible Employees details in a document entitled "Equibank: Compensation Program Changes." A copy of Defendants' "Compensation Program" is attached hereto as Exhibit "B".

10. In the "Compensation Program", Defendants described a program to pay compensation in the form of the return of the Plan's surplus by paying Equimark common stock into an ESOP Plan:

> *You Get a Stake in Equibank*
>
> Surplus funds in the retirement plan (approximately $8 million) will be returned to Equibank as primary capital. The bank *will then fund* an Employee Stock Ownership Plan, or ESOP, with approximately 3 million shares of Equimark stock (at $2.68 per share) equal to the surplus in the retirement plan. *Equibank will pay the entire cost for this.* Nothing will come out of your pocket. *The ESOP is effective, retroactively, to January 1, 1984.* (Emphasis added)

11. In Defendants' "Compensation Program", Eligible Employees were defined as certain employees employed at calendar year end in 1984, and thereafter in 1985 and 1986 as follows:

> You're eligible for an ESOP contribution if you are a full-time active or disabled employee or regular part-time employee (Code 20) employee [for years ended 1984, 1985 and 1986].
>
> You do not have to enroll in the plan. *You'll be included automatically if you are eligible.* (Emphasis added)

12. Other documents distributed by Equimark and/or Equibank or both further explained the Equibank compensation program between Eligible Employees and Defendants. For example, in a document entitled "Commonly Asked Questions", it was stated:

> A. What is this ESOP all about?
>
> Q. *The Employee Stock Ownership Plan will provide all full-time and Code 20 part-time employees with as much as 3 million shares of Equimark stock . . . at no cost!* In this way, we will be returning to employees an amount of stock equal to the surplus in the Retirement Plan. . . .
>
> The ESOP will give eligible employees voting privileges and a way to share in the bank's future success. As the stock in the ESOP increases in value, employees will reap the benefits by watching their own accounts grow. The value of our ESOP accounts will depend on our success on the job. The opportunity for growth is great!
>
> Employees will become fully vested in the ESOP after only five years, and any previous Retirement Plan service counts toward vesting in the ESOP. (Emphasis added)

A copy of Defendants' "Commonly Asked Questions" is attached hereto as Exhibit "C".

13. The "Commonly Asked Questions" continued to explain the Equibank compensation program as follows:

> Q. Why not distribute the stock directly to employees?

A. While possible, immediate distribution of your benefit would create an immediate tax liability. The ESOP provides you with a way to shelter this windfall benefit from immediate taxation and defer taxes.

Q. Why is the ESOP contribution being made over a 3 year period?

A. Section 415 of the Internal Revenue Code restricts total contributions an employer can make to any single employee to the lesser of $30,000 or 25% of compensation during any year. If the entire ESOP contribution, valued at approximately $8 million, was made in one year, these IRS limitations would be exceeded.

14. Defendants produced and distributed another document entitled "Compensation Program Changes at a Glance" in which they further stated and explained:

EMPLOYEE STOCK OWNERSHIP PLAN (ESOP)

* Effective retroactive to January 1, 1984.

* Eligible employees include full-time, disabled and regular (Code 20) part-time employees.

* Funded with Equimark Corporation common stock ($2.68/share) equal in value to Retirement Plan surplus.

* Contributions allocated over 3 years (1984 - 1986) to employees on payroll as of December 31.

A copy of Defendants' "Compensation Program Changes At A Glance" is attached hereto as Exhibit "D".

15. Plaintiff Lash, as an Assistant Vice-President and Manager of the Brentwood community branch office, received the Defendants' contract to provide him and other Eligible Employees approximately 3,000,000 shares of Equimark stock and continued to work for Equibank through December 31, 1984 and then thereafter through year end 1985.

16. Defendant Equibank's November 8, 1984 contract to set aside approximately 3,000,000 Equimark shares valued at approximately $8 million was intended to compensate Eligible Employees who continued their employment with Equibank through year end in 1984, 1985 and 1986:

> *The ESOP contribution will be allocated to eligible employees over a three-year period: 1984, 1985 and 1986.* At the end of each calendar year, the bank will make a contribution to the ESOP account of each eligible employee. *Individuals employed on the last day of each calendar year will share in the contribution. The contribution will be in the form of Equimark stock issued for use only in the ESOP.* The stock will be held in an account established in your name. (Emphasis added) See "Compensation Program", Exhibit "B".

17. Vesting of rights under the ESOP was represented to be based upon service credits from the terminated Plan. Rights in the ESOP were described as vesting with five (5) years of service.

18. The Defendants' "Compensation Program" further stated that a more detailed description of the ESOP would be provided to employees to be included in the

Equibank Employee Handbook. Additionally, it stated the following:

> And, the ESOP will become effective only if shareholder and regulatory approvals are received early next year.

19. No attempt was made by either Equimark or Equibank to obtain shareholder approval. No attempt was made by either Equimark or Equibank to obtain regulatory approval. Alternately, if any attempt was made, it was not made in good faith and did not constitute a reasonable attempt.

20. Defendants failed to provide Eligible Employees, i.e., those employees who continued to work for Equibank throughout 1984, and thereafter in 1985 or 1986, the agreed compensation in the form of the 3,000,000 Equimark shares of stock.

21. Plaintiff Lash, at all relevant times, was a full time employee of Equibank, who under the terms of Defendant Equibank's November 8, 1984 contract, would have been entitled to compensation in the form of Equimark stock benefits for the calendar years 1984 and 1985.

22. Plaintiff Lash has suffered a pecuniary loss as a result of the Defendants' failure to pay him the Equimark stock benefits for those two years (1984 and 1985).

CLASS ALLEGATIONS

23. This is a class action brought on behalf of all current or former Equibank full time active or disabled employees or regular part-time employees (Code 20) who

were employees on November 8, 1984 and continued to work through at least year end in calendar year 1984.

24. The class of Plaintiffs is so numerous as to make it impractical to bring all eligible members of the class before the Court. It is believed that there are approximately 1,200 to 1,300 employees or former employees in the proposed Plaintiff class. The exact number of Equibank member employees is unknown to Lash but may be determined from the records maintained by Defendant Equibank. In many instances such employees or former employees are unaware that claims may exist on their behalf. In other instances, the individual class member's claims are not large enough to justify the expense and effort of a separate suit, but as a class those claims do economically justify legal action.

25. Multiple common questions of law and fact affect the right of each member of the class and common relief by way of damages is sought for all class members.

26. The predominating questions of fact and law are:

a. Whether Defendant Equibank contracted with its Eligible Employees to provide them an ESOP plan and/or approximately 3,000,000 shares of Equimark stock;

b. Whether Defendant Equimark caused Defendant Equibank to breach its contract with its Eligible Employees to provide them an ESOP plan and/or approximately 3,000,000 shares of Equimark stock;

c. Whether Defendants Equimark and/or Equibank failed to seek or obtain shareholder and regulatory approval of the proposed ESOP Plan;

d. Whether Equimark and/or Equibank failed to act in good faith or to take reasonable steps to obtain shareholder and regulatory approval of the proposed ESOP Plan;

e. Whether Defendant Equibank breached its duty of good faith and fair dealing by failing to establish an ESOP Plan or pay Equibank Eligible Employees approximately 3,000,000 shares of Equimark common stock;

f. Whether Defendant Equimark and/or Equibank were unjustly enriched by failing to establish an ESOP Plan or pay Equibank Eligible Employees approximately 3,000,000 shares of Equimark common stock; and

g. Whether a constructive trust should be imposed on Defendant Equimark and/or Equibank for wrongfully retaining the approximately 3,000,000 shares of Equimark stock that they agreed to pay Eligible Employees.

27. Plaintiff Lash will assure the adequate representation of all members of the class, and has no conflict with class members in the maintenance of this action. His interests in this action are antagonistic to the interests of both Defendants Equimark and Equibank. Lash is aware that he cannot settle this class action without Court approval and will vigorously pursue the class claims throughout the course of this litigation.

28. Plaintiff Lash will also assure the fair and adequate representation of the class by his retention of attorneys who are experienced in class actions. Lash can acquire adequate financial resources for the conduct of this litigation. In addition, Plaintiff's Counsel have agreed with the Plaintiff to pay all reasonable costs in this case contingent upon the outcome of this case.

29. A class action will provide a fair and efficient method to adjudicate this controversy since the claims of the class members are virtually identical in that they raise the same questions of law and require the same kind of evidentiary proof.

30. Plaintiff Lash believes and therefore avers that there are no unusual legal or factual issues which would create manageability problems. Individual factual issues as to the measure of damages are subject to documentary proof which in most, if not all, cases is in Defendant Equibank's possession.

31. Plaintiff Lash believes and therefore avers that because many class members are unaware of their claims and because there claims are small in relation to the costs of an individual suit, a class action is the only proceeding in which class members can, as a practical matter, recover. If pursued as an individual claim, this action could substantially affect the rights of similarly situated eligible employees who might pursue their claims. In addition, Defendants Equimark and Equibank might then be confronted with inconsistent or varying adjudications.

32. Plaintiff Lash is unaware of any other litigation challenging Defendants Equimark's or Equibank's failure

to provide its employees with the contracted for approximately 3,000,000 shares of Equimark stock.

COUNT ONE
STATING A CLAIM AGAINST DEFENDANT EQUIBANK FOR BREACH OF CONTRACT

33. The averments of paragraphs 1 through 32, inclusive, are incorporated.

34. Defendant Equibank contracted with its Eligible Employees after Defendants withdrew $8.1 million from the Plan which had previously been maintained for the benefit of Equibank employees to set aside approximately 3,000,000 shares of Equimark stock, having a value of approximately $8.1 million dollars to be allocated to Eligible Employees who worked at year end in 1984, and thereafter in 1985 and 1986.

35. Defendant Equibank failed to pay Eligible Employees approximately 3,000,000 shares of Equimark common stock, nor did either Defendant make an effort or alternately, a good faith attempt or any reasonable effort to obtain the necessary approval to provide Eligible Employees the ESOP plan.

36. The amount in controversy includes $20,000 excluding interest and costs.

PRAYER FOR RELIEF (DEFENDANT EQUIBANK'S BREACH OF CONTRACT)

WHEREFORE, Representative Plaintiff, James W. Lash, on behalf of himself and all other Eligible

Employees similarly situated, respectfully requests that this Honorable Court grant the following relief:

a. The damages sustained by the Representative and Class plaintiffs who, by virtue of Defendant Equibank's breach of contract, have not received their pro rata share of the approximately 3,000,000 shares of Equimark common stock; and

b. Appropriate retroactive dividends, pre-judgment interest and costs of this suit.

COUNT TWO

STATING A CLAIM AGAINST DEFENDANT EQUIBANK FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING IMPLIED IN THE NOVEMBER 8, 1984 CONTRACT WITH THE CLASS MEMBERS

37. The averments of Representative Plaintiff Lash in Paragraphs 1 through 36 inclusive of this Complaint are incorporated.

38. The November 8, 1984 contract to pay Eligible Employees approximately 3,000,000 shares of Equimark common stock contained an implied duty of good faith and fair dealing.

39. Defendant's failure to act in good faith or to take any steps (or alternatively, reasonable steps) to obtain shareholder and regulatory approvals breached its duty of good faith and fair dealing.

40. The amount in controversy exceeds $20,000 exclusive of interest and costs.

PRAYER FOR RELIEF (DEFENDANT EQUIBANK'S BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING)

WHEREFORE, Representative Plaintiff, James W. Lash, on behalf of himself and all other Eligible Employees, respectfully requests that this Honorable Court grant the following relief:

a. The damages sustained by the Representative and Class Plaintiffs who, by virtue of Defendant Equibank's breach of the duty of good faith and fair dealing, have not received their pro rata share of the approximately 3,000,000 shares of Equimark common stock; and

b. Appropriate retroactive dividends, pre-judgment interest and costs of this suit.

COUNT THREE

STATING A CLAIM AGAINST BOTH DEFENDANTS FOR UNJUST ENRICHMENT

41. The averments of Plaintiff Lash in Paragraphs 1 through 40 inclusive of this Complaint are incorporated.

42. Defendants' use of some or all of the Equimark stock that was to be distributed to Plaintiffs results in the unjust enrichment of Defendants, including certain of Defendants' senior management that would not have been entitled to participate in the ESOP Plan.

43. The amount in controversy exceeds $20,000 exclusive of interest and costs.

PRAYER FOR RELIEF (BOTH DEFENDANTS' UNJUST ENRICHMENT)

WHEREFORE, Representative Plaintiff, James W. Lash, on behalf of himself and all other Eligible Employees, respectfully requests that this Honorable Court grant the following relief:

a. A full and complete accounting;

b. The damages sustained by the Representative and Class Plaintiffs who, by virtue of Defendants' unjust enrichment, have not received their pro rata share of the approximately 3,000,000 shares of Equimark common stock; and

c. Appropriate retroactive dividends, pre-judgment interest and costs of this suit.

COUNT FOUR

STATING A CLAIM AGAINST BOTH DEFENDANTS FOR CONSTRUCTIVE TRUST

44. The averments of Plaintiff Lash in Paragraphs 1 through 42 inclusive of this Complaint are incorporated.

45. Defendants are in a fiduciary or other special relationship with respect to Eligible Employees like Plaintiff Lash with whom Equibank and Equimark, through its control of Equibank, made a commitment on November 8, 1984 to set aside and pay 3,000,000 shares of Equimark common stock in exchange for continued employment. This fiduciary or special relationship existed as a result of Defendants' taking of funds from the Eligible Employees' Pension Funds, and simultaneously promising to use said funds exclusively for the Eligible Employees' benefits in

exchange for their continued employment on dates certain at year end 1984, 1985 and 1986.

46. Defendants, as fiduciaries, are responsible for paying Plaintiffs the 3,000,000 shares of Equibank stock in accordance with Equibank's November 8, 1984 commitment.

47. Defendants' failure to pay Plaintiffs approximately 3,000,000 shares of common stock is a breach of their fiduciary duties, which gives rise to the need for a constructive trust over the 3,000,000 shares of Equimark stock for the benefit of Plaintiffs.

48. The amount in controversy exceeds $20,000 exclusive of interest and costs.

PRAYER FOR RELIEF

(BOTH DEFENDANTS' BREACH OF CONSTRUCTIVE TRUST)

WHEREFORE, Representative Plaintiff, James W. Lash, on behalf of himself and all other Eligible Employees, respectfully requests that this Honorable Court grant the following relief:

a. A full and complete accounting;

b. The damages sustained by the Representative and Class Plaintiffs who, by virtue of Defendants' breach of fiduciary or special duties, have not received their pro rata share of the approximately 3,000,000 shares of Equimark common stock; and

c. Appropriate retroactive dividends, pre-judgment interest and costs of this suit.

BERGER KAPETAN MALAKOFF
& MEYERS, P.C.

By /s/ Michael P. Malakoff
Michael P. Malakoff
Fred S. Longer

508 Law & Finance Building
Pittsburgh, PA 15219
(412) 281-4200
Attorneys for the Representative
Plaintiff James W. Lash and Class
Plaintiffs

Dated November 7, 1988

EXHIBIT "A"

Equibank
November 8, 1984

Dear Employee:

As you know, we're planning to make several changes to your benefit program. These changes will give you part ownership in the bank's parent company. Here are the details:

- Effective November 30, 1984, the Equimark Corporation Retirement Plan will be terminated. Approximately $8 million in surplus funds will become available and will be used to increase our primary capital by approximately $8 million.
- Equimark Corporation Common Stock (at $2,68 per share), with a value identical to the retirement plan surplus, will be set aside for employees through an Employee Stock Ownership Plan (ESOP). This plan is being created to provide all full-time and disabled employees and regular part-time (Code 20) employees with a windfall benefit equal to approximately 3 million shares of Equimark stock. This plan will give you a way to share in the bank's future success. As the stock increases in value, you'll reap the benefits. Your ESOP benefit will be paid to you in stock or cash at retirement or termination.
- The benefits you have earned through November 30, 1984 under the present Retirement Plan will be guaranteed to you whether or not you are now vested under the plan. The bank will safeguard these benefits by purchasing an insurance annuity for you through the Pacific Mutual Life Insurance Company, a multi-billion-dollar, "A+" rated insurance company. Through this annuity, you'll receive guaranteed monthly payments at retirement, based on benefits

you have earned in the present plan through November 30, 1984. Any payment option available to you under the Retirement Plan will be available to you through the annuity. Within several months, you'll receive an annuity certificate from Pacific Mutual. You may request your benefit calculation and a sample copy of the annuity certificate by calling Centrex 5075 after December 17.

- A replacement to the Retirement Plan, an enhancement to the present Savings Plus Plan, becomes effective January 1, 1985. This new feature of the Plan will be a semi-monthly bank contribution of 2 percent of your pay – whether or not you are making voluntary contributions to the Plan. In addition, the savings feature of the Plan will continue to match 50 cents on each dollar you contribute, up to 6% of your pay. Eligible employees will include all full-time employees, those on disability and part-time employees who have worked at least 1,000 hours during a service anniversary year.

Additional enhancements are also being made to the Savings Plus Plan. You'll be receiving additional information concerning all of these changes from your manager later in the month.

The changes being made will provide opportunities for both corporate and personal financial growth and success. If you have any questions, call the Compensation Division, Centrex 5073, 5075 and 5947.

Sincerely,

/s/ JDL
James D. Lowry
Chairman, President and
Chief Executive Officer

EXHIBIT "B"

EQUIBANK

COMPENSATION PROGRAM CHANGES

We're Ending the Present Retirement Plan . . . But you'll Keep What You've Earned and Get More . . .

The present Equimark Corporation Retirement Plan is being terminated on November 30. We'll have a new plan in place on January 1, 1985 through an improvement to the Savings Plus Plan. You won't build up any additional benefits in the old plan after November 30 – but you won't lose any benefits you have already earned under the plan. And you'll begin earning retirement benefits in a new plan.

If you are a participant in the retirement plan, the bank is guaranteeing your present benefit by taking money in the retirement plan fund and by purchasing an annuity in your name through the Pacific Mutual Life Insurance Company, and "A+" rated multibillion-dollar insurance company. This annuity is a contract between you and the insurance company. Equibank paid an amount of cash to the insurance company. In turn, the insurance company has agreed to pay you a certain amount of money each month beginning at your retirement. Any payment option now available to you under the retirement plan will be available to you through the annuity. Any plan benefit valued at $1,700 or less will be paid to you directly in the form of a lump sum payment.

The annuity will be provided for you regardless of whether you are vested. This is important. Employees who leave the bank with fewer than 10 years of service have no right to a benefit under the old retirement plan.

But, because the old retirement plan is being replaced, the bank is vesting every plan participant in the benefit he or she earns through November 30. For example, suppose you only have 6 years with the bank. You are still fully vested in the retirement plan benefit you have earned, even though you haven't met the 10-year vesting requirement. Those 6 years of service also count toward vesting in a new Employee Stock Ownership Plan.

When you retire, that annuity will pay the benefit that you have earned through November 30. For example, suppose you would have received $300 a month from the old retirement plan, based on your service through November 30. Equibank has paid the insurance company enough money from the retirement plan fund to buy a guaranteed $300-a-month annuity contract for you.

Within several months, you'll receive an annuity certificate from the insurance company that will give you specific information on the amount of your benefit from the old retirement plan.

You Get A Stake In Equibank

Surplus funds in the retirement plan (approximately $8 million) will be returned to Equibank as primary capital. The bank will then fund an Employee Stock Ownership Plan, or ESOP, with approximately 3 million shares of Equimark stock (at $2.68 per share) equal to the surplus in the retirement plan. While other companies have terminated retirement plans and used excess funds to benefit themselves, eligible Equibank employees will receive a windfall benefit through the ESOP. Equibank will pay the

entire cost for this. Nothing will come out of your pocket. The ESOP is effective, retroactively, to January 1, 1984.

You're Eligible for ESOP if . . .

You're eligible for an ESOP contribution if you are a full-time active or disabled employee or a regular part-time (Code 20) employee.

You do not have to enroll in the plan. You'll be included automatically if you are eligible.

Your ESOP Works Like This . . .

The ESOP contribution will be allocated to eligible employees over a three-year period: 1984, 1985 and 1986. At the end of each calendar year, the bank will make a contribution to the ESOP account of each eligible employee. Individuals employed on the last day of each calendar year will share in the contribution. The contribution will be in the form of Equimark stock issued for use only in the ESOP. The stock will be held in an account established in your name. Any dividends paid on the stock will be automatically invested in more stock. Each quarter, you will receive a personal statement showing the number of shares in your account. The value of the stock will always be at least equal to that of Equimark common stock, which is reported daily on the New York Stock Exchange.

The amount of stock you receive will be based on this formula:

- Each year the board decides how much the bank will contribute – let's assume it decides on $3 million.

- Then, let's total up the salaries paid to all Equibank employees who are eligible for the plan for the year – let's say that figure is $37.5 million.
- Next, divide the bank contribution by the total salaries. In your example, that would be $3 million divided by $37.5 million, which comes to .08 or 8 percent.
- Finally, multiply your salary (say it's $15,000 a year) by the percentage figure, and you have the amount you'll get for that year. In this example, that would be $15,000 times 8 percent, or $1,200. That means Equibank would contribute stock worth $1,200 to your account in that year.

You Get A Voice In the Bank

The ESOP gives you rights to stock and voting privileges. You will be able to vote the shares in your account. And, you'll have an opportunity to share in the bank's future success. The value of your account will depend on our collective success on the job. The opportunities for growth are great.

You Can Get Your Money When You Retire . . .

When you retire, you can take your ESOP account in the form of Equimark stock or cash.

. . . Or Even Earlier

The ESOP offers an advantage that the old retirement plan didn't. Under that plan, you couldn't receive benefits until you were at least

55 years of age. This rule applied even for employees who left the bank with a "vested" benefit many years before reaching early or normal retirement age. To be "vested" in a plan means that you have gained a non-forfeitable right to a benefit under that plan, even if you leave the bank.

Under the ESOP, if you are vested, you receive your payout from the plan soon after you leave the bank. And, if upon your death you're a vested participant in the plan, your account will be paid to your beneficiary. The payment in either case can be in stock or in cash.

If you are presently totally disabled or become totally disabled and unable to work while an ESOP participant, the bank will make contributions to your ESOP account. The contribution will be based on your salary at the time you become disabled.

You're Fully Vested In The ESOP After Five Years

As noted earlier, to be "vested" in a plan means that you have gained a non-forfeitable right to a benefit under that plan, even if you leave the bank. Under the ESOP, you become fully vested in the plan after 5 years of "credited" service. Your past service as a member of the old retirement plan will count in determining when you become vested in the ESOP. So, if you've already earned 5 years of service under the retirement plan, you'll be fully vested in the ESOP. If you leave the bank before you have earned 5 years of service, you'll have a partial right to your account as follows:

After two years.....40% vesting

After three years.....60% vesting

After four years .....80% vesting

After five years.....100% vesting

If you are an eligible part-time employee, you'll receive vesting credit for any calendar year in which you work at least 1,000 hours beginning in 1984.

Your Savings Plus Plan Is Now the Employee Savings and Retirement Plan

You Get An Automatic 2% Contribution

As a replacement to the old retirement plan, beginning January 1, 1985, the bank will make a contribution for all eligible employees to a new retirement feature of the plan. Thus contribution will be equal to 2 percent of pay – regardless of whether you make voluntary contributions to the Plan – and it will be made with each pay.

This contribution will be invested in a new Guaranteed Income Fund which will provide you with a guaranteed interest rate. You'll be automatically vested and this account will be payable upon your termination, retirement or death.

You Can Participate, Even If You're Under Age 25

Next year, all full-time and part-time employees who have worked at least 1,000 hours in an anniversary year will be eligible to participate in the Employee Savings

and Retirement Plan. And, we're dropping the requirement that you must be at least age 25 to save in the "Tax-Saver" part of the plan.

In addition, the savings feature of the plan will continue to match 50 cents on each dollar you contribute, up to 6% of your pay. You can contribute a maximum of 6% to the plan through the Tax-Saver (before-tax) feature of the plan and up to 10% through the Regular Saver (after-tax) feature of the Plan. Your total contribution, however, cannot exceed 10%.

You Can Save On Taxes

The Tax-Saver feature, you may remember, was introduced last year. It provides that your contributions to the plan are made before federal income tax is calculated, thereby lowering your income tax. Federal regulations prohibit withdrawals from the Tax-Saver account until you reach age 59½, unless you have serious financial needs. However, to help you meet other financial needs, a new loan provision is being added to the plan.

You Can Borrow From Your Savings And Pay Yourself Back!

Beginning January 1, you will be able to borrow up to half of your vested account, including your Tax-Saver balance. You'd be borrowing from yourself, because all the principal and interest you repay on the loan will be placed back in your account – and you may be able to claim the interest as a deduction when figuring your income tax. You pay no tax on funds you borrow from the account, as you would if you withdrew the money.

You'll have up to 59 months to repay your loan. The interest you pay will be the same rate you'd get on the new Guaranteed Income Fund.

Your Investment Options Are Streamlined

As of January 1, 1985, the plan will offer four investment funds:

- Equimark Corporation Stock Fund – Common stock of the bank's holding company, Equimark.
- Fixed Income Security Fund – There will be no change in this fund, which is invested in long-term, high-grade corporate bonds and notes selected for quality, income and maturity.
- Equity Fund – This fund is invested in quality common stocks that promise good opportunity for capital appreciation. Beginning next year, it will be a fully invested, separately managed fund, and will not be comingled [sic] with the funds of other investors.
- Guaranteed Income Fund – This fund will replace the Government Obligations Fund and the Money Market Fund. Money now invested in these two funds will be transferred automatically to the new Guaranteed Fund, unless you specify otherwise. The Guaranteed Income Fund will be invested in a time deposit account with an interest rate based on negotiable certificates of deposit (CDs) issued by Equibank. Both principal and interest will be guaranteed. New interest rates will be set each January 1 and July 1. This fund is insured by the Federal Deposit

Insurance Corporation for up to $100,000 per participant. FDIC rules require that you must give notice of at least 32 days before the end of the calendar quarter if you wish to withdraw money from the Guaranteed Fund.

You can invest in one or more of these funds in increments of 25 percent – instead of 20 percent as is permitted now.

Withdrawal Penalties Have Been Reduced!

Beginning January 1, withdrawal penalties have been reduced to a six month suspension for any regular withdrawals you make from your Regular Saver account and vested bank matching contributions and interest. Special situation withdrawals can continue to be made without suspension penalties.

Enroll Later This Month

Please review this information carefully, share it with your family, and, if eligible, be ready to make your choices concerning the Employee Savings and Retirement Plan during the enrollment period later this month. You will also receive, later on, more detailed descriptions of all these plans that you can put in your Equibank Employee Handbook. Remember, this information provides highlights only. Benefits available under the plans are governed by the official plan documents, which are available for your inspection in the Human Resources Department. And, the ESOP will become effective only if shareholder and regulatory approvals are received early

next year. In the event any questions arise about the plans, the official plan documents will govern.

Have Questions?

If you have questions about the changes described here, you can get the answers by calling our special telephone Hotline between 8 a.m. and 6 p.m. on any business day. The number: 288-5075.

Changes At A Glance

Concerning your . . .

Retirement/ESOP

Old Provisions . . .	**New Provisions . . .**
Old retirement plan pays a fixed benefit based on pay and service at retirement. If you are vested and leave the bank, your retirement benefit is not payable until you reach early or normal retirement age. Covers full-time employees only.	New ESOP will return stock with a value equal to the surplus retirement plan funds to employees thru annual bank contributions. If you're vested, the account is yours if you leave the bank before retirement. ESOP also covers regular part-time (Code 20) employees. And, you're vested in your retirement benefit under the old plan even if you have fewer than ten years of service. Also, a replacement to the old retirement plan will be established through an enhancement to the Savings Plan.

Employee Savings and Retirement Plan

Old Provisions . . .	**New Provisions . . .**
Bank matches 50% of your savings up to 6% of pay.	Bank contributes 2% of pay even if you don't save in the plan; and, bank matches 50% of your savings up to 6% of pay.
Full-time and regular part-time code 20 employees are eligible.	All full-time and part-time employees who work at least 1,000 hours in a service anniversary year.
Must be at least age 25 to invest in Tax-Saver account.	You can participate in Tax Saver at any age.
You're vested in matching bank contributions after 4 years in plan.	You're vested in the 2% retirement contribution immediately. You're vested in matching bank contributions after 4 years in plan.
You can save up to 10% of pay.	You can save up to 10% of pay. Tax-Saver maximum of 6%.
There are 5 investment funds. None are guaranteed or insured.	There are 4 investment funds. One is guaranteed and insured by F.D.I.C.
Tax-Saver account not available for withdrawal until age 59½ or special situation hardship.	While Tax-Saver withdrawal restrictions still apply, a loan feature will permit you to borrow up to half of your account, including your Tax-Saver balance. The interest you pay on the loan is placed back in your account. And, you pay no tax on loans you make, as you would if you withdrew the money.

EXHIBIT "C"

COMMONLY ASKED QUESTIONS

Q. Why is the Retirement Plan being terminated?

A. The Retirement Plan termination will allow us to return approximately $8 million in surplus funds back to the bank as primary capital. These excess funds are not needed to pay retiree benefits or any benefits earned to-date through the Plan. Federal regulations permit the return of these funds only if the Plan is terminated. This move will assist us in meeting our goal of increasing primary capital.

Q. What happens to the benefits I have already earned under the Retirement Plan?

A. The benefits you have earned under the Plan through November 30, the Plan termination date, will be *guaranteed* to you through an annuity that has already been purchased for you through the Pacific Mutual Life Insurance Company. Pacific Mutual, a multibillion-dollar insurance company with an "A+" rating (the highest rating available) has guaranteed to make monthly payments to you at retirement based on the benefits you earn through November 30. Any payment option available to you under the Retirement Plan will be available to you through the annuity. Within several months, you'll receive an annuity certificate from Pacific Mutual. In the meantime, you may request your benefit calculation and a sample copy of the annuity certificate by calling Centrex 5075 after December 17.

Q. Will there be a replacement to the Retirement Plan?

A. Yes! The new retirement plan will become effective January 1, 1985 through an enhanced Savings Plan. This enhanced Plan, called the Employee Savings

and Retirement Plan, will include a Retirement Feature through which the bank will contribute an *additional* 2% of your pay semi-monthly. This contribution will be made whether or not you are currently a participant. And, it will be in *addition* to the bank's contribution to the voluntary Savings Feature of the Plan.

The Plan will be open to all full-time and Code 20 part-time employees and any other part-timers who works 1,000 hours in a service anniversary year. In addition, employees on long-term disability will receive the 2% Retirement Feature contribution.

Q. What about this new Loan Feature that's being added?

A. The new Loan Feature will become effective January 1, 1985 and can provide you access to Tax-Saver funds that would otherwise be locked up until you reached age 59½ or qualified for a special situation hardship. Through this feature, you can actually borrow from yourself and repay interest back to your account. In addition, the interest you repay, which will be equal to the rate paid on the Guaranteed Income Fund, may qualify as a tax deductible expense if you itemize your deductions for federal income tax purposes.

Loans will be available each quarter following the Plan's quarterly valuation. In addition, a special valuation and loan offering will be made available for the proposed employee rights offer which will provide employees with an opportunity to purchase additional Equimark stock at $2.68 per share.

Any funds invested in the Tax-Saver, Regular Saver and Rollover Features and any vested bank matching contributions qualify. The minimum loan available will be in the amount of $500; the maximum loan

available will be in the amount of $10,000 or 50% of the vested account balance, up to $50,000.

Q. What is this ESOP all about?

A. The Employee Stock Ownership Plan will provide all full-time and Code 20 part-time employees with as much as 3 million shares of Equimark stock . . . at no cost! In this way, we will be returning to employees an amount of stock equal to the surplus in the Retirement Plan. While other companies have terminated plans and used those funds to benefit only themselves, we wanted to give something of value to employees also.

The ESOP will give eligible employees voting privileges and a way to share in the bank's future success. As the stock in the ESOP increases in value, employees will reap the benefits by watching their own accounts grow. The value of our ESOP accounts will depend on our success on the job. The opportunity for growth is great!

Employees will become fully vested in the ESOP after only five years, and any previous Retirement Plan service counts toward vesting in the ESOP.

Q. When will I receive the stock in my ESOP account?

A. The ESOP account will be paid out, in stock or cash, at your retirement or termination. In the event of your death, the account will be paid to your beneficiary.

Q. Why not distribute the stock directly to employees?

A. While possible, immediate distribution of your benefit would create an immediate tax liability. The ESOP provides you with a way to shelter this windfall benefit from immediate taxation and defer taxes.

Q. Why is the ESOP contribution being made over a 3 year period?

A. Section 415 of the Internal Revenue Code restricts total contributions an employer can make to any single employee to the lesser of $30,000 or 25% of compensation during any year. If the entire ESOP contribution, valued at approximately $8 million, was made in one year, these IRS limitations would be exceeded.

Q. Why are Tax-Saver contributions limited to 6% beginning in 1985?

A. For the same reason the ESOP contributions are being made over three years. Tax-Saver contributions are considered by the IRS to be "employer" contributions. Once again, the IRS Section 415 limitations restrict the total an employer can contribute.

EXHIBIT "D"

COMPENSATION PROGRAM CHANGES
AT A GLANCE

RETIREMENT PLAN TERMINATION

- Effective November 30, 1984.
- Plan benefits earned through November 30 *guaranteed* through an annuity purchased from Pacific Mutual Life Insurance Company.
- Total benefits valued at $1,700 or less will be be [sic] paid in a lump sum.
- Immediate vesting as of November 30.
- Surplus Retirement Plan funds (approximately $8MM) returned to Equimark as primary capital.

EMPLOYEE STOCK OWNERSHIP PLAN (ESOP)

- Effective retroactive to January 1, 1984.
- Eligible employees include full-time, disabled and regular (Code 20) part-time employees.
- Funded with Equimark Corporation common stock ($2.68/share) equal in value to Retirement Plan surplus.
- Contributions allocated over 3 years (1984-1986) to employees on payroll as of December 31.
- Contributions based on compensation; i.e.:

Estimated Annual Contribution	$3,000,000	
÷ Total Annual Salaries of Eligible Employees	÷ 37,500,000	
	= .08 or 8%	
x Employee's Annual Salary	x $ 15,000	($41,229,36)
= Contribution	= $ 1,200	($3,298.32)
At $2.68/share	= 447 shares	(1,230.7)

- Vesting:
  - After 2 years ..... 40% vesting
  - After 3 years ..... 60% vesting
  - After 4 years ..... 80% vesting
  - After 5 years .....100% vesting
- Previous Retirement Plan service counts toward ESOP vesting.
- Code 20 part-time employees earn vesting years beginning in 1984 for calendar years in which 1,000 hours are worked.
- ESOP paid in stock or cash at retirement, death or termination.

EMPLOYEE SAVINGS AND RETIREMENT PLAN

- Enhanced Savings Plus Plan.
- Eligible employees include full-time, Code 20 part-time employees and other part-time employees who work 1,000 hours in a service anniversary year.

- Retirement Plan Feature
  - Bank contribution of 2% of pay, semi-monthly.
  - Immediate Vesting.
  - Invested in new Guaranteed Income Fund.
  - Payable at retirement, death or termination.
  - Disabled employees eligible.
- Savings Plan Feature
  - Employee contribution: 1% to 10% (Tax-Saver maximum of 6%).
  - 50% bank match up to 6% of pay.
  - Tax-Saver age requirement eliminated.
  - Suspension penalties reduced to 6 months.
- Loan Feature
  - Allows you to borrow from your account and repay interest to your account.
  - Provides access to Tax-Saver funds.
  - Fixed interest rate equal to interest rate paid on Guaranteed Income Fund.
  - Payback Period: 12, 24, 36, 48 or 59 months.
  - Minimum loan: $500
  - Maximum loan: $10,000 or 50% of vested account balance up to $50,000.

- Tax-Saver, Regular Saver, Vested bank match and rollovers available for loan.
- One loan at any time.

- Rollover Feature
  - Permits rollovers from other retirement plans.
- Investment Funds
  - Equimark Corporation Stock Fund
  - Fixed Income Fund
  - Equity Fund
    - No longer a comingled [sic] fund; fully invested in common stocks and equivalents.
  - Guaranteed Income Fund
    - Time Deposit Open Account.
    - Guaranteed fixed interest rate equal to bank's quoted rate on 6 month negotiable certificates of deposit.
    - Rate changes January 1 and July 1.
  - Government Obligations and Money Market Funds eliminated.
    - Unless otherwise specified, these funds will transfer to the Guaranteed Income Fund as of January 1.
  - Contributions must be invested in 25% multiples.
- Enrollment
  - Begins: November 21.
  - Deadline: December 7

VERIFICATION

I, JAMES W. LASH, hereby verify that the statements set forth in the foregoing Class Action Complaint in Civil Action are true and correct to the best of my knowledge, information and belief.

I understand that false statements made herein are subject to the penalties of 18 Pa.C.S. §4904, relating to unsworn falsification to authorities.

/s/ James W. Lash
James W. Lash

APPENDIX E

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

JAMES W. LASH, Individually and on behalf of other Equibank employees and former employees similarly situated,

Plaintiffs,

v.

EQUIBANK, a Pennsylvania Banking Institution, and EQUIMARK CORPORATION, a Delaware Corporation,

Defendants.

CIVIL DIVISION

No. GD. 88-19416

Issue No.
Contract, Multiple Civil Action

DEFENDANTS' PRELIMINARY OBJECTIONS

Code No. 011

JURY TRIAL DEMANDED

Filed on behalf of Defendants Equibank and Equimark Corporation

Counsel of Record for this Party:

Edward C. Schmidt, Esq.
Pa. I.D. #16356

Gordon W. Schmidt
Pa. I.D. #21265

Rose, Schmidt, Hasley & DiSalle
Firm #043
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(412) 434-8600

NOTICE TO PLEAD

TO: Michael P. Malakoff, Esquire
Fred S. Longer, Esquire
Berger Kapetan Malakoff & Meyers
508 Law & Finance Building
Pittsburgh, PA 15219

You are hereby notified to file a written response to the enclosed Preliminary Objections within twenty (20) days from the date of service hereof or a judgment may be entered against you.

Respectfully submitted,

ROSE, SCHMIDT, HASLEY & DiSALLE

By /s/ Mary T. DePasquale
Edward C. Schmidt
Gordon W. Schmidt
Mary T. DePasquale

900 Oliver Building
Pittsburgh, PA 15222-5369
(412) 434-8600

Attorneys for Equibank and Equimark Corporation

PRELIMINARY OBJECTIONS OF DEFENDANTS' EQUIBANK AND EQUIMARK CORPORATION

AND NOW COME defendants Equibank and Equimark Corporation ("Equimark") by their undersigned counsel and file the following Preliminary Objections to plaintiff's Complaint under Pennsylvania Rule of Civil Procedure 1017(b) based upon the following:

I. MOTION TO STRIKE COMPLAINT

1. The instant complaint contains four counts: Count One – Breach of Contract; Count Two – Breach of Duty of Good Faith and Fair Dealing; Count Three – Unjust Enrichment; Count Four – Constructive Trust. The first two counts are directed solely toward defendant Equibank. Counts Three and Four are against both Equibank and Equimark.

2. Plaintiff contends that Equibank contracted to establish an Employee Stock Ownership Plan ("ESOP") to be funded with approximately 3,000,000 shares of Equimark common stock valued at approximately $8 million, and demands the benefits allegedly due him pursuant to that plan. (Complaint, ¶¶ 8, 34).

3. The proposed ESOP is an employee benefit plan governed by the Employee Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*

4. ERISA creates a federal cause of action for recovery of benefits due under pension and welfare plans, and for breach of fiduciary duty by benefit plan fiduciaries. Section 1144(a) of the statute specifically preempts state

laws related to ERISA-governed benefit plans, and federal courts have extended ERISA preemption to state common law causes of action as well.

5. Plaintiff has asserted only state common law claims in his effort to recover benefits allegedly due him under the ESOP proposal. Such claims are preempted by ERISA. Accordingly, defendants move that they be stricken for lack of conformity to law.

II. DEMURRER TO COUNT ONE

6. In Count One, plaintiff contends that the November 8, 1984 letter (the "Information Letter") describing various proposals which Equibank's management was considering with respect to its employees' benefit programs constitutes a contract pursuant to which Equibank promised to create an ESOP to be funded with approximately 3,000,000 shares of Equimark common stock. (Complaint, ¶¶ 8, 34).

7. Plaintiff further contends that Equibank breached the alleged contract by failing to attempt to obtain necessary approval of the ESOP proposal and by failing to pay eligible employees approximately 3,000,000 shares of Equimark common stock. (Complaint, ¶¶ 19, 20, 35).

A. Absence of an Offer to Contract

8. Under Pennsylvania law and § 24 of the Restatement (second) of Contracts, the first essential of any contract is a promise or an offer to enter into a contract. A mere expression of intention or general willingness to act

on the happening of a particular event or in return for something does not amount to an offer.

9. The Information Letter and the other documents referenced by plaintiff clearly state that creation of an ESOP was merely one of several ideas that Equibank's management was considering. Such expressions of the management's intentions for the future are insufficient, as a matter of law, to constitute an offer capable of acceptance.

B. Public Policy

10. Under Pennsylvania law, a court should not interfere in the internal management of a corporation or substitute its judgment for that of the corporation's management.

11. In the exercise of its sound business judgment, Equibank's management decided not to submit the ESOP proposal for the necessary shareholder and regulatory approvals, and it would be contrary to public policy and Pennsylvania corporation law for the Court to interfere with that decision.

C. Lack of Consideration

12. Consideration is an essential ingredient of a contract, and a promise unsupported by consideration is unenforceable.

13. Consideration confers a benefit upon the promisor or causes a detriment to the promisee and must be an act, forbearance or return promisee and must be an act,

forbearance or return promise bargained for and given in exchange for the original promise.

14. Plaintiff has not alleged that he conferred a bargained-for benefit on Equibank which was valid consideration for Equibank's alleged return promise to establish an ESOP. The mere fact that plaintiff remained in Equibank's employ and continued to render the services for which he was hired and compensated is insufficient consideration to support the alleged contract.

D. Lack of Mutuality

15. Obligations under a contract must be mutual and not merely unilateral. Both parties to the contract must have the power to compel performance by the other and must be provided with legal redress in the event either defaults in his obligations.

16. As an at-will employee, plaintiff had no obligation to remain in Equibank's employ; and, even if a contract was formed pursuant to which plaintiff promised continued service in exchange for Equibank's alleged promise to establish an ESOP, Equibank was powerless to enforce plaintiff's promise; therefore, the alleged contract lacked mutuality of obligation and cannot be enforced.

III. DEMURRER TO COUNT TWO

17. In Count Two, plaintiff contends that the alleged contract contained an implied duty of good faith and fair dealing and that defendants breached this duty by failing to seek shareholder and regulatory approvals of the ESOP proposal. (Complaint ¶¶ 38 and 39.)

18. The allegations contained in the Complaint do not establish that a contract to seek shareholder and regulatory approvals of the ESOP proposal was formed; therefore, there can be no implied duty of good faith and fair dealing.

19. Additionally, the decision not to seek shareholder and regulatory approvals of the ESOP proposal was an exercise of Equibank's management's discretion and should not be scrutinized under the business judgment rule.

IV. DEMURRER TO COUNT THREE

20. In Count Three, plaintiff attempts to state a claim in unjust enrichment based on the contention that defendants' use of all or some of the stock allegedly designated to fund the proposed ESOP resulted in unjust enrichment. (Complaint ¶ 42.)

21. To state a claim under the doctrine of unjust enrichment, plaintiff must show that defendants wrongfully secured or passively received a benefit that would be unjust to retain.

22. Where a party to a contract seeks to enforce that contract against a third party, Pennsylvania courts refuse to permit recovery under the doctrine of unjust enrichment simply because one contracting party has failed to perform.

23. Plaintiff has failed to allege the existence of any type of relationship between himself and Equimark or that Equimark had an obligation to provide stock for his

benefit thereby making Equimark's receipt of benefits from the continued use of its own stock unconscionable.

24. Plaintiff has not alleged that Equibank received or was in possession of any Equimark stock which Equibank could have used to obtain a benefit which would be unjust to retain.

V. DEMURRER TO COUNT FOUR

25. In Court Four, plaintiff contends that both defendants are in a special or fiduciary relationship with plaintiff and that their breach of their fiduciary duties gives rise to the need for imposition of a constructive trust over 3,000,000 shares of Equimark common stock for plaintiff's benefit. (Complaint ¶¶ 45, 47.)

26. Under Pennsylvania law, a constructive trust will be imposed only if it is shown that the person holding property acquired it is some way that creates an equitable duty in favor of the plaintiff.

27. Plaintiff has failed to plead sufficient facts against either defendant to justify imposition of a constructive trust. Nowhere in the Complaint is it alleged that Equibank ever received or had possession of any Equimark common stock which it was obligated to convey to plaintiff nor is it alleged that Equimark had any legal or equitable duty to distribute its own stock to plaintiff. Accordingly, defendants demur to Count Four.

WHEREFORE, for the foregoing reasons, defendants respectfully request that this Honorable Court enter an Order sustaining defendants' Preliminary Objections.

Respectfully submitted,

ROSE, SCHMIDT, HASLEY & DiSALLE

By /s/ Edward C. Schmidt
Edward C. Schmidt
Gordon W. Schmidt
Mary T. DePasquale

900 Oliver Building
Pittsburgh, PA 15222-5369
(412) 434-8600

Attorneys for Equibank and Equimark Corporation

VERIFICATION

The undersigned hereby verifies the averments contained in the foregoing Preliminary Objections are true and correct to the best of his knowledge, information and belief. This Verification is made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsifiction to authorities.

Date: 12/21/88 (Illegible)

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

JAMES W. LASH, individually and on behalf of other Equibank employees and former employees similarly situated,	)	No. G.D. 88-19416
Plaintiffs,	)	
v.	)	
EQUIBANK, a Pennsylvania Banking Institution, and EQUIMARK CORPORATION, a Delaware Corporation,	)	
Defendants.	)	

ORDER

AND NOW This ___ day of ___, 1989, defendants Equibank and Equimark Corporation having filed preliminary objections to the Complaint,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Count One be dismissed for failure to state a claim upon which relief can be granted.

BY THE COURT:

_____, J.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document, Preliminary Objections, was sent by first-class mail, postage prepaid to counsel of record as follows:

Michael P. Malakoff
Fred S. Longer
Berger, Kapetan, Malakoff & Meyers
508 Law and Finance Building
Pittsburgh, PA 15219

Date: 12-21-88

/s/ Edward C. Schmidt